144-621

RECORD, CASE No. 13,329.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 248.

MICHAEL CROTTY, PLAINTIFF IN ERROR,

vs.

THE UNION MUTUAL LIFE INSURANCE COMPANY
OF MAINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 15, 1888.

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1 *Complaint.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

Michael Crotty, Plaintiff,
vs.
Union Mutual Life Insurance Company of Maine (Incorporated), Defendant.

The above-named plaintiff, for cause of action against the above-named defendant, complains and alleges:

First. That said plaintiff is and was at all the times mentioned herein a resident of the State of California, and that defendant is an incorporation incorporated and existing at all the times mentioned herein by and under the laws of the State of Maine and a corporation resident of the State of Maine.

Second. That on the 31st day of January, 1883, in the city of Portland, State of Maine, in consideration of the payment by plaintiff to the defendant of the semi-annual premium of $109.20 and of the application for insurance hereinafter referred to, defendant, by its agents duly authorized, made and delivered to the plaintiff its policy of insurance upon the life of Michael O'Brien, a copy of
which said policy and of said application for insurance are
2 hereunto annexed and specially referred to as and made a
part of this complaint and marked Exhibit "A" and Exhibit A I, and thereby insured the life of said Michael O'Brien in the sum of $10,000, payable to this plaintiff according to the terms and conditions of said policy of insuarance.

Third. That plaintiff was at the time of effecting said policy of insurance, & at the time of the death of said Michael O'Brien a creditor of said Michael O'Brien for various sums of money, which this plaintiff had at various times advanced to the said Michael O'Brien, amounting to several thousand dollars, and as such creditor had a valuable interest in the life of said Michael O'Brien.

Fourth. That on the 15th day of September, 1883, at the city of Boston, State of Massachusetts, the said Michael O'Brien died.

Fifth. That on the 14th day of January, 1884, plaintiff furnished the defendant with proof of the death of said Michael O'Brien in this case and otherwise performed all the conditions of the said policy of insurance on his part.

Sixth. That no part of the amount of said policy has been paid, although plaintiff has demanded the payment of the same from defendant, and that the whole of the same is now due from defendant to this plaintiff.

Wherefore plaintiff asks judgment against said defendant for the sum of ten thousand — ($10,000) and interest thereon from the 13th day of April, 1884, at the rate of seven per centum per annum until paid, and besides his costs of suit.

3 CHAS. J. SWIFT,
Attorney for Plaintiff.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Michael Crotty, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

MICHAEL CROTTY.

Subscribed and sworn to before me this 2d day of January, 1885.

E. H. THARP,
Notary Public.

4 EXHIBIT A.

Union Mutual Life Insurance Company of Maine

Amount of policy, $10,000; age of issue, 27; premium, $109.20; policy number, 76873.

In consideration of the application for this policy of insurance, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material and warrants to be full and true and to be the only statements upon which the contract is made; and in further consideration of the payment of the sum of one hundred and nine dollars and twenty cents at the home office of the company, at the date hereof to be evidenced by the receipt of the company, and of the payment of the like sum to be made at the said office on or before the fifteenth day of January and July in every year during the continuance of this contract,

Does promise Michael O'Brien, of Lockford in the State of California to pay to said Michael O'Brien the sum of ten thousand dollars (any indebtedness to the company on account of this contract to be first deducted therefrom) at the office of the company
5 in Portland, Maine, on the fifteenth day of January in the
year nineteen hundred and forty-one, or if said Michael O'Brien shall die before that time, to pay said sum within ninety days after notice and satisfactory proofs of death shall have been furnished to the company at its said office, to Michael Crotty his creditor if living; if not, then to the said Michael O'Brien's executors, administrators or assigns, upon the following conditions:

First: If any statement made in this application for this policy be in any respect untrue, the consideration of this contract shall be deemed to have failed, and the company shall be without liability under it. But the company hereby waives all defenses under this article, except for fraud, if the death of the party occurs after three years from the date hereof; but if the age of the party insured is not correctly stated in the application, no more insurance will be paid hereunder than the amount that the premiums charged would have purchased at the rates for the insured's true age in use at the date of this policy.

Second: If any premium, or instalment of a premium on this policy shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, except as hereinafter provided; and the only evidence of payment shall be the receipt of the company, signed by the president or secretary.

6 Third: If within three years from the date hereof the person insured shall die in consequence of a duel; or in violation of the law; or by disease, violence, or accident brought about by intoxication; or shall impair his health by narcotics or alcoholic stimulants; or shall have delirium tremens; or, if without the written consent of the company, signed by the president or secretary thereof, he shall pass or remain beyond the limits of residence and travel, or shall personally engage in any of the occupations or employments which are specified on the back of this policy, the company shall be released from all liability on account of this contract.

Fourth. It is hereby declared and agreed that the self-destruction of the person, within three years from the date hereof, whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in this contract, but in every such case the company will upon demand made and the surrender of this policy, accompanied by satisfactory proofs of such death within ninety days of its occurrence, pay the net reserve upon it held by the company at the beginning of the year in which death occurs, calculated by the combined experience table of mortality, with interest at the rate of four per centum per annum, first deducting therefrom any indebtedness which shall have accrued to the company on account of this contract.

Fifth: The contract between the parties hereto is completely
7 set forth in this policy and the application therefor, taken
together, and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose will not be delegated and it is further declared and agreed that in case the obligation of the company under this contract be defeated by the failure of any of the considerations, or by the violation of any of the covenants or conditions recited or referred to herein, all payments which shall have been made to the company on account of this contract shall be forfeited to the company.

Sixth. The proofs of the death by which this contract matures must be furnished to the company within one year after such death; and no action shall be commenced upon this policy after one year from the time when the cause of action accrues; and if any action be commenced after that time, the lapse of time shall be conclusive evidence against the claim.

Seventh. The provisions and requirements printed by the company upon the next page of this policy are hereby referred to and

accepted as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof the said Union Mutual Life Insurance Company has caused this policy to be signed by its president and secretary at its office in the city of Portland, the thirty-first day of January A. D. one thousand eight hundred and eighty-three.

8 JOHN E. DE WITT, *President.*
NICHOLAS DE GROOT,
Ass't Secretary.

Provisions and Requirements Referred to in this Policy.

Limits of residence and travel.

The limits of travel and residence under this contract are between the parallels of the Tropic of Cancer and the Arctic Circle; also to travel between ports within the said parallels and the Island of Cuba; also between ports on the Pacific coast within said parallels and the Sandwich islands and residence therein, and China and Japan; and to passage between said parallels in the North Atlantic and in the North Pacific oceans, by way of the Isthmus of Darien.

Travel is permitted in first class vessels within the aforesaid limits.

But travel and residence of the person at whose death this contract matures, beyond the above limits will release the company from all liability under this contract.

Occupations and employments.

The occupations and employments, engagement in which will release the company from all liability under this contract, are—
9 blasting, mining, submarine labor, aeronautic travel and excursions, the manufacture, handling or transportation of inflammable or explosive substances; service upon any railroad, steamboat, or boat, except conductors and engineers on railroads, and masters, supercargoes, mates and other officers of vessels; military and naval service of every kind, whether as combatant or non-combatant, the militia, in time of peace, excepted.

Provisions for payment of premiums.

All premiums are due at the office of the company at the city of Portland, at the date named in the policy; but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt therefor, signed by the president or secretary. No payment made to any person, except in exchange for such receipt will be recognized by the company or be deemed by either party as valid payment.

If, for any reason, a premium is received after it becomes due, it is upon the express condition that the party whose life is thereby insured is, at the time of the receipt of such premium in good health, and of correct, sober and temperate habits; and if the fact is otherwise, the policy shall not be put in force by such receipt.

And such receipt must in every case be understood by the
10 parties as an act of courtesy on the part of the company, and in no case whatever as constituting any obligation on its part to waive the payment of a future premium when due.

In case any note, check, or draft given towards the payment of any premium, shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium when due.

Commencement of assurance year and balance of year's premium.

All premiums are payable annually in advance. When the premium is made payable in semi-annual or quarterly instalments, that part of the year's premium, if any, which remains unpaid at the maturity of this contract shall be regarded as an indebtedness to the company; and if any such payment be not made on or before the day it is due, the company shall, from that day, be released from all liability under this contract, except as hereinafter provided, when the premium is payable semi-annually or quarterly, in ascertaining the net value of the policy to determine the extension under the non-forfeiture law, there shall be deducted from the net value of the policy (assuming net annual premiums) the net premium for the unpaid quarterly or semi-annual instalments for that year, which instalment shall not be considered as an indebtedness, but as forborne premiums.

11 Assignments.

This company will not take notice of any assignment of this policy until a duplicate thereof shall be delivered to the company; and under no circumstances will the company assume any responsibility for the validity of such assignment.

Surplus.

1. This policy during its continuance by the payment of premiums shall be entitled to participate in the apportionment of the surplus of the company, according to the principles and methods adopted by the company for such apportionment.
2. The dividends hereon will be paid by reversionary additions to the amount insured.
3. When the payment of premiums is discontinued after the third year and before the tenth year, the present value of said dividend additions at actuaries' rate of mortality, with interest at four per centum per annum, shall be added to the value allowed for the policy under this contract, and the sum applied to continue in force the amount originally insured according to the provisions of the Maine non-forfeiture law and this contract.
4. But after premiums have been paid ten years, in case of failure to pay any subsequent premium when due, the company agrees, and is hereby authorized to pay the same out of the present value

of any additions to the policy computed as aforesaid, until
12 the value of the additions is reduced to an amount less than
the premium then due. The effect of such payment shall be in all respects as though such premiums were actually paid in cash, giving the same right to dividends; and the holder of the policy shall have the right at any time during the continuance thereof by this application of dividends, to resume the payment of premiums in cash without being subjected to further medical examination.

5. When payment of premiums is discontinued after the tenth year and after the present value of the additions has been exhausted by the payment of premiums to the extent and as above provided, the present value of any remaining addition, less than the premium then due, shall be added to the value allowed for the policy under this contract, and the sum applied to continue in force the amount originally insured, according to the provisions of the Maine non-feiture law and this contract.

6. Whenever the reserve on this policy and the additions thereto calculated as aforesaid, shall amount to the sum originally insured hereunder, the same shall be payable at once, as a matured endowment, upon surrender and legal discharge of this policy, at the option of the holder thereof.

13 The Maine non-forfeiture law.

The Union Mutual Life Insurance Company, on the one part, by the delivery of this policy, and all persons who have or hereafter may have any interest therein on the other part, by the acceptance thereof when delivered, each in consideration of the promise of the other, hereby promise and agree with each other that if the policy shall lapse for the non-payment of any premium, premium or other note or interest thereon, after it shall have been in force three full years (no other condition of the policy having been violated) the rights of the parties shall be and each party be bound to abide by, perform and accept, the following provisions of the law of the State of Maine; viz:

Takes effect April 1, 1877.

SEC. 1. Every policy of life insurance issued on and after the first day of April in the year of our Lord one thousand eight hundred and seventy seven by any company chartered by the authority of this State which may be forfeited for non-payment of premiums, including all notes given for premiums or interest thereon after it shall have been in force three full years and which shall not
contain provision for a surrender value at
14 least equivalent to the value arising under
the terms of this act, shall, nevertheless be continued in force to an extent and for a period of time to be determined as follows, to wit: The net value of the policy, when the premium become- due and is not paid shall be ascertained

How the value and extension of insurance is determined.

according to the combined experience of actuaries rate of mortality, with interest at four per cent. per annum.

75 per cent. of net value allowed.

After deducting from three-fourths of such net value any indebtedness to the company or notes held by the company against the insured (which notes if given for premium shall then be cancelled) what remains shall be considered as a net single premium of temporary insurance; and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the policy, and the assumptions of mortality and interest as aforesaid; but if the
15 policy shall be an endowment payable at
a certain time, or at death, if it should previously occur, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the balance of the endowment term for the full amount of the policy, such excess should be considered as a net single premium or simple endowment, payable only at the same time as the original endowment, and in case the life insured survives to such time: and the amount thus payable by the company shall be determined according to the age of the party at the time of the lapse of the policy and the assumptions of mortality and interest aforesaid.

In case of endowment policies, balance payable in cash.

Settlement of death claims arising under lapsed policies.

Sect. 2. If the death of the life insured occur within the term of temporary insurance covered by the value of the policy as determined in the previous section, and if no condition of the insurance other than the payment of pre-
16 mium has been violated by the insured,
the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy contrary notwithstanding; provided, however, that notice of the claim, and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy, within ninety days after the decease; and provided also that the company shall have the right to deduct from the amount insured in the policy the amount, compounded at seven per centum per annum, of all the premiums that had been forborne at the time of the death, including the whole of the year's premium in which the death occurs.

But, instead of deducting one-fourth of said net value, to obtain said net single premium, there shall be deducted the present value

of the differences between the future premiums named in the policy
and the future net premiums on said policy ascertained ac-
17 cording to the rates of mortality and interest aforesaid; which
deduction in no event, however, shall exceed one-fourth of
said net value.

And the ordinary life premium, not, however, to exceed five in number at age of issue, viz: $20.93 at age of 27 for each $1,000 insured, shall be deducted from the policy if it becomes a claim, as provided in the law, instead of the larger premium named in the policy:

The proof of death may be filed in all cases within one year after such death, instead of within ninety days as provided in the law:

So that, if no condition of the policy, other than the payment of premiums is violated, the results named in the statement on the third page hereof shall be secured to the beneficiary, provided all premiums paid on this policy have been fully paid in cash; but if there remains any more or other indebtedness against this policy at the date of lapse, it will be deducted according to the provisions of the Maine non-forfeiture law.

Policy
due at death
or age 85.

Issued
at
age 27.

The Union Mutual Life Insurance Company.

18 The foregoing policy No. 76,873, issued under the Maine non-forfeiture law, provided none of the conditions thereof, other than the payment of premiums has been violated, secures the results named in the following statement. But if there remain any dividend-additions in favor of the policy, or any indebtedness against the policy when it goes under the Maine non-forfeiture law, the results will be modified according to the provisions of that law and the foregoing contract.

JOHN E. DE WITT, *President.*

H. D. SMITH, *Secretary.*

For each $1,000 insured.

3 annual premiums will secure 5 years and 159 days' insurance.

4 annual premiums will secure 7 years — 102 days' insurance.

5 annual premiums will secure 9 years and 48 days' insurance.

6 annual premiums will secure 10 years and 364 days' insurance.

7 annual premiums will secure 12 years and 320 days' insurance.

8 annual premiums will secure 14 years and 278 days' insurance.

9 annual premiums will secure 16 years and 236 days' insurance.

10 annual premiums will secure 18 years and 181 days' insurance.

11 annual premiums will secure 20 years and 103 days' insurance.

19

For each $1,000 insured.

12 annual premiums will secure 21 years and 361 days' insurance.
13 annual premiums will secure 23 years and 224 days' insurance.
14 annual premiums will secure 25 years and 60 days' insurance.
15 annual premiums will secure 26 years and 231 days' insurance.
16 annual premiums will secure 28 years and 12 days' insurance.
17 annual premiums will secure 29 years and 131 days' insurance.
18 annual premiums will secure 30 years and 229 days' insurance.
19 annual premiums will secure 31 years and 306 days' insurance.
20 annual premiums will secure 32 years and 364 days' insurance.
21 annual premiums will secure 34 years and 38 days' insurance.
22 annual premiums will secure 35 years and 60 days' insurance.
23 annual premiums will secure 36 years and 66 days' insurance.
24 annual premiums will secure 37 years and 108 days' insurance.
25 annual premiums will secure 38 years and 200 days' insurance.
26 annual premiums will secure 39 years and 270 days' insurance.

20

27 annual premiums will secure 40 years and 321 days' insurance.
28 annual premiums will secure 41 years and 353 days' insurance.
29 annual premiums will secure 43 years and 5 days' insurance.
30 annual premiums will secure 44 years and 9 days' insurance.
31 annual premiums will secure 45 years and 0 days' insurance.
32 annual premiums will secure 45 years and 345 days' insurance.
33 annual premiums will secure 46 years and 317 days' insurance.
34 annual premiums will secure 47 years and 280 days' insurance.
35 annual premiums will secure 48 years and 236 days' insurance.

36 annual premiums will secure 49 years and 185 days' insurance.

37 annual premiums will secure 50 years and 127 days' insurance.

38 annual *payments* will secure 51 years and 64 days' insurance.

39 annual premiums will secure 51 years and 361 days' insurance.

40 annual premiums will secure 52 years and 294 days' insurance.

21

For each *one th* $1,000 insured.

41 annual premiums will secure 53 years and 224 days' insurance.

42 annual premiums will secure 54 years and 152 days' insurance.

43 annual premiums will secure 55 years and 78 days' insurance.

44 annual premiums will secure 56 years and 2 days' insurance.

45 annual premiums will secure 56 years and 302 days' insurance.

46 annual premiums will secure 57 years and 240 days' insurance.

47 annual premiums will secure 58 years' insurance and $98.58 payable when the insured attains age 85.

48 annual premiums will secure 58 years' insurance and $256.38 payable when the insured attains age 85.

49 annual premiums will secure 58 years' insurance and 394.60 payable when the insured attains age 85.

50 annual premiums will secure 58 years' insurance and $514.95 payable when the insured attains age 85.

51 annual premiums will secure 58 years' insurance and $618.73 payable when the insured attains age 85.

52 annual premiums will secure 58 years' insurance and $707.34 payable when the insured attains age 85.

22

For each $1,000 insured.

53 annual premiums will secure 58 years' insurance and $782.29 payable when the insured attains age 85.

54 annual premiums will secure 58 years' insurance and $844.94 payable when the insured attains age 85.

55 annual premiums will secure 58 years' insurance and $896.75 payable when the insured attains age 85.

56 annual premiums will secure 58 years' insurance and $930.04 payable when the insured attains age 85.

57 annual premiums will secure 58 years' insurance and $973.05 payable when the insured attains age 85.

58 annual premiums will secure 58 years' insurance and $1,000.00 payable when the insured attains age 85.

If the party whose life is insured dies before discontinuing the payment of premiums, the whole of the sum insured, less any indebtedness due the company on this contract will be paid as a death-claim, provided no condition of the policy has been violated.

After the policy has been in force three full years, if less than the full number of premiums agreed upon in the policy is paid, and the party whose life is insured dies after such discontinuance, and within the period of the extension secured by this con-
23 & 24 tract under the Maine non-forfeiture law, the amount due as a death-claim if no condition of the policy other than the payment of premium has been violated, will be as follows:

If death occurs the first year after lapse and within the period of continued insurance $977.60 will be paid on each $1,000 insured.

If death occurs the second year after lapse and within the period of continued insurance $953.64 will be paid on each $1,000 secured.

If death occurs the third year after lapse, and within the period of continued insurance $928 will be paid on each $1,000 insured.

If death occurs the fourth year after lapse and within the period of continued insurance $900.57 will be paid on each $1,000 insured.

If death occurs the fifth year after lapse and within the period of continued insurance $871.21 will be paid on each $1,000 *secured.*

If death occurs after the fifth year after lapse and within the period of continued insurance, the deduction shall not exceed the five annual life premiums as aforesaid, with interest as provided in the Maine non-forfeiture law.

(Endorsed:) Filed January 2d, 1885. L. S. B. Sawyer, clerk.

25 *Examination of Urine Made for the Union Mutual Life Insurance Company of Maine.*

DIRECTOR'S OFFICE 153 TREMONT STREET,
BOSTON, MASS.

1. Name of the applicant? Michael O'Brien.
2. Was the specimen passed by the applicant? Yes.
3. What is the color? Amber.
4. Is it acid or alkaline? Acid.
5. What is the specific gravity? 1020°.
6. Does it contain albumen? No.
7. Does it contain sugar? No.
8. Does the microscope show the presence of tube casts, blood or pus corpuscles? No.

Dated at San Francisco, Jan. 22nd, 1883.

BENJ. R. SWAN M. D.,
Medical Examiner.

[On the margin:] The medical examiner will be entitled to a fee of $3.00 for making the examination and filling the certificate.

NOTE.—The specimen should be allowed to stand a sufficient time before examination for the ordinary deposit to take place—not less than 3 or 4 and not more than 24 hours. The microscopic examination must be made in all cases.

26 *Summons.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

MICHAEL CROTTY, Plaintiff, *vs.* UNION MUTUAL LIFE INSURANCE Company of Maine (Incorporated), Defendant.	Action Brought in the said Circuit Court and the Complaint Filed in the Office of the Clerk of said Circuit Court, in the City and County of San Francisco.

The President of the United States of America, Greeting, to Union Mutual Life Insurance Company of Maine (incorporated), defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county, or if served out of this county, then within thirty days, or judgment by default will be taken against you.

27 The said action is to recover the sum of ten thousand dollars and interest thereon from the 15th day of April, 1884, at the rate of seven per centum per annum until paid, alleged to be due from defendant to plaintiff upon a certain policy of insurance upon the life of one Michael O'Brien, all of which is more fully set out in the original complaint on file herein, to which reference is hereby made, and for the costs of this action; and if you fail to appear and plead, answer, or demur, as herein required, your default will be entered and the plaintiff will take judgment against you for said sum of ten thousand dollars and interest thereon as aforesaid, and costs of this action.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 2nd day of [SEAL.] January, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the 109th.

L. S. B. SAWYER, *Clerk.*

(Endorsed:) United States marshal's office, district of California. I hereby certify that I received the within writ on the 3d day of January, 1885, and personally served the same, on the 7th day of January, 1885, on the within-named defendant, The Union Mutual Life Insurance Company of Maine (incorporated), by deliver-
28 ing to and leaving with E. Hawkins, the person appointed by said defendant as its agent resident in the State of California, under section 616 of the Political Code of said State, at the city —

county of San Francisco, in said district, a certified copy thereof, together with a copy of the bill of complaint, certified to by plaintiff's attorney, attached thereto. San Francisco, Jan'y 7, 1885. M. M. Drew, U. S. marshal, by B. J. Akerman, deputy. Filed January 8, 1885. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

29 *Demurrer.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of California.

MICHAEL CROTTY, Plaintiff,
vs.
UNION MUTUAL LIFE INSURANCE COMPANY, Defendant.

To the Hon. Lorenzo Sawyer, judge of the circuit court of the United States in and for the ninth circuit, district of California:

Now comes the defendant in the above-entitled action, by its attorneys, Estee and Wilson, and, not confessing all or any of the matters and things in plaintiff's complaint contained to be true in manner and form as the same are therein set forth and alleged, doth demur to said complaint, and for cause of demurrer shows:

1.

That the matters contained in said complaint are not sufficient in law for the said plaintiff to have or maintain his action against the defendant, and that this defendant is not bound by law to answer the same.

2.

That said complaint and the matters contained therein are ambiguous, uncertain, and insufficient, in this:

30 That it appears from said complaint and the policy of insurance annexed thereto and made a part thereof that the application and the statements in said application contained, and upon the faith of which said policy was issued, are by the terms of said policy made a part thereof, and that said application *and that said application* and statements with the policy constitute the contract upon which this action is brought.

That said complaint does not set out, either *in hæc verba* or in substance or at all, said application and statements.

That it appears upon the face of the complaint that the entire contract which is made the formation of the action is not set out.

Wherefore defendant prays that it may go hence with its costs.

ESTEE & WILSON,
Attorneys for Defendant.

M. M. ESTEE,
RAMON E. WILSON,
Of Counsel.

The undersigned, attorneys and counsellors of this court and *and* the attorneys and counsel who have subscribed their names as such to the above and foregoing demurrer, do hereby certify that in our opinion and in the opinion of each of us said demurrer is well founded in point of law.

San Francisco, March 23rd, 1885.

M. M. ESTEE.
RAMON E. WILSON.

31 (Endorsed:) Service of the within admitted by copy this 23rd day of Mar., 1885. C. J. Swift, attorney for plaintiff. Filed March 23rd, 1885. L. S. B. Sawyer, clerk.

32 At a stated term, to wit, the February term, A. D. 1886, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the courtroom, in the city and county of San Francisco, on Monday, the sixth day of April, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order.

M. CROTTY
vs.
THE UNION MUTUAL LIFE INSURANCE COMPANY. } No. 3547.

This cause came on regularly this day to be heard upon the demurrer to the complaint herein, R. E. Wilson, Esq., appearing for said demurrer and the defendant and C. J. Swift, Esq., in support of the complaint, and was argued by the respective counsel and submitted to the court for consideration and decision.

And the same having been duly considered, it is ordered that said demurrer be, and the same hereby is, sustained, with leave to the plaintiff to amend his complaint by attaching thereto the application for insurance. 33

Endorsed: I hereby certify that the foregoing is a full, true, and correct copy of an order made and entered in the above-entitled cause. Attest my hand and the seal of said circuit court this 22d day of July, A. D. 1886. (Seal.) L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

34 *Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

MICHAEL CROTTY, Plaintiff,
vs.
UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE (a Corporation), Defendant. }

Now comes the defendant in the above-entitled action, by its attorneys, Estee & Wilson, and for answer unto the amended complaint of plaintiff on file herein—

Denies that on the 31st day of January, 1883, or at any other time, in the city of Portland, State of Maine, or at any other place, for the consideration mentioned in said complaint or for any consideration or at all, the defendant, by its agents, duly authorized or otherwise, made or delivered to the plaintiff its policy of insurance upon the life of Michael O'Brien, or thereby insured the life of Michael O'Brien in the sum of $10,000 or in any other sum of money, payable to the plaintiff.

Defendant denies, upon information and belief, that at the time alleged in said complaint or at any other time the plaintiff was a
creditor of the therein-mentioned Michael O'Brien for various
35 or any sums of money which the plaintiff had at various
times or at any time advanced to said Michael O'Brien,
amounting to several thousand dollars or any sum whatever, or that said plaintiff, as a creditor or otherwise or at all, had a valuable or any interest in the life of said Michael O'Brien.

Denies, upon information and belief, that at the time alleged in said complaint or at any other time the plaintiff advanced any money whatever to the said Michael O'Brien, or that he, said plaintiff, at said time or at any time was a creditor of said Michael O'Brien.

Defendant denies that by the policy of insurance referred to in said complaint and made a part thereof that it thereby insured the life of Michael O'Brien, the party in said policy mentioned, or that it thereby insured the life of any person named Michael O'Brien or any person whatever.

Defendant denies that in addition to or otherwise than furnishing the defendant with proof of the death of said Michael O'Brien the plaintiff performed all the conditions of the said policy on his part.

Denies that there is now due from the defendant to plaintiff the
sum of ten thousand dollars or any other sum whatever.

36 And for other and further answer this defendant admits
that it made and delivered to the plaintiff a policy of insurance, a copy of which is annexed — the plaintiff's said complaint, but avers that the party whose life it intended to insure thereby, as and by it believed to be Michael O'Brien, whose proper name was Michael J. O'Brien, was another person fraudulently assuming and simulating for the purpose of imposing upon defendant the personal identity of said O'Brien.

That said policy of insurance referred to in said complaint was made and issued in consideration of an application in writing for said policy made by Michael O'Brien on the 22nd day of January, 1883, and of each of the statements made therein, which application, by the terms of said policy, is made a part thereof; a copy of which application is annexed to said complaint and made a part thereof.

That among other things specified in and provided by said policy is the following: That said policy was issued upon the faith of the truth of the statements, representations, and declarations made in said application; that if any statement made in said application be in any respect untrue the consideration of said policy or contract should be deemed to have failed, and the defendant should be without liability under said policy.

That the application hereinabove referred to, and which is a
part of said policy, and a copy of which is annexed to plain-
37 tiff's said complaint and made part thereof, was made in the
city and county of San Francisco, State of California, on the
22nd day of January, 1883.

That said application is divided into three parts. The first thereof, or "form A," as it is designated, contains answers, statements, and declarations made by the said Michael O'Brien and subscribed to by him or by the person who simulated his personal identity. The second thereof, or "form B," as it is designated, contains answers, statements, and declarations made to the medical examiner of the defendant, and also declarations and agreements made by the said Michael O'Brien and subscribed to by him or by the person who simulated his personal identity. The third thereof, or "form C," as it is designated, contains the medical examiner's report and is subscribed by him.

That among other things stated in said application and in "form A" by said Michael O'Brien or by the person who simulated his personal identity is the following: That his full name was Michael O'Brien, whereas in truth and in fact, as defendant is informed and believes, his full name was Michael James O'Brien.

It is further stated therein that the date of his birth was the 25th day of December, 1855, whereas in truth and in fact, as defendant is informed and believes, the date of his birth was the 25th day of
December, 1857.

38 In "form B" the following questions are asked of the said
Michael O'Brien, viz:

"Are you now in good health?"

"Do you usually have good health?"

And to each of said questions he answered, "Yes;" that, as defendant is informed and believes, the answers to said questions are wilfully false, and that said Michael O'Brien when he made said answers knew that the same were false; that in truth and in fact, as defendant is informed and believes, the said Michael O'Brien at the time said application was made was not in good health, but, on the contrary, was in bad health, and that he did not usually have good health, but, on the contrary, had been sick and ill for several months prior to the making of said application.

Said Michael O'Brien was also asked the following question, viz:

"Has your weight recently diminished?"

To which he gave answer, "No;" whereas in truth and in fact, as defendant is informed and believes, his weight had recently diminished and to some considerable extent, and the said Michael O'Brien knew that fact.

Said O'Brien was also asked the following question:

"Have you ever been subject to any of the following disorders or diseases: Consumption, habitual cough?"

To which he gave answer, "No."

That, as defendant is informed and believes, the answers to said

questions and each of them are willfully false, and that said
39 Michael O'Brien when he made said answers knew that the
same were false.

That in truth and in fact, as defendant is informed and believes, the said Michael O'Brien, at the time said application was made and for some time prior thereto, had the consumption and a habitual cough.

Said Michael O'Brien was also asked the following question:

"Have you ever had any injury?"

To which he gave answer "No;" whereas, in truth and in fact, the said O'Brien, in or about the month of July, 1882, as defendant is informed and believes, was thrown from a vehicle and was seriously injured thereby.

That said O'Brien, in answer to a question, stated in said application that he never was ill in his life; that, as defendant is informed and believes, said statement is willfully false, and that the said O'Brien knew that the same was false when the same was made.

That in truth and in fact, as defendant is informed and believes, the said O'Brien, at the time said application was made, was and for a long time prior thereto had been in bad and ill health.

Said Michael O'Brien was also asked the following question, viz:

"When did you last consult a physician for any illness?"

To which he gave answer "Never."

That, as defendant is informed and believes, the answer to said
question is willfully false, and that said O'Brien, when he
40 made said answer, knew that the same was false.

That in truth and in fact, as defendant is informed and believes, the said O'Brien had consulted divers and various physicians concerning his health and for illness immediately and within six months prior to the making of said application.

Said Michael O'Brien was also asked to give the name and residence of his usual medical adviser, to which he stated and replied, "Have none;" whereas in truth and in fact, as defendant is informed and believes, the said O'Brien, at the time of making said application and for a long time prior thereto, did have a usual medical adviser with whom he was in the habit of consulting in regard to his health and an illness.

That, as defendant is informed and believes, the said O'Brien made false statements in said application in regard to the age of his father and mother at the time of their respective deaths, and also in regard to the causes of death of his said father and mother respectively, all of which said statements the said Michael O'Brien knew, at the time the same were made, were false.

Said Michael O'Brien was also asked the following question:

"Is there anything to your knowledge or belief in your physical condition tending to shorten your life which is not distinctly set
forth above" (referring to said application)?

41 To which he gave answer, "None."

That, as defendant is informed and believes, said answer is willfully false and the said O'Brien at the time he made the same knew it was false.

That in truth and in fact, as defendant is informed and believes, the said O'Brien, at the time said answer and application were made and for a long time prior thereto, had been afflicted with consumption which tended to and did shorten his life.

That all of the answers, statements, and representations hereinabove set forth were, by the said Michael O'Brien, declared to be correct and true, and subscribed to by him or by a person simulating his personal identity.

That, as defendant is informed and believes, each and all of the hereinabove-mentioned statements and representations, and contained in said application, was and were and are wilfully false and fraudulent, and so known to be by the person so making them, and designed by said person to misrepresent the truth and to deceive this defendant.

That in addition to the questions and answers contained in said "form B" of said application are certain declarations and agreements which are made a part of said application and are subscribed by the said Michael O'Brien or the person simulating his personal identity.

42 That, among other things contained therein, the said O'Brien declared and agreed that all the statements and answers to the printed questions written upon forms "A" and "B" (being the portions of the application hereinabove referred to and including the statements and answers hereinabove set forth), which, together with this declaration and agreement (being the declaration and agreement hereinabove referred to), constitute an application to the Union Mutual Life Insurance Company of Maine for an insurance of ten thousand dollars upon the life of Michael O'Brien, are offered to the said company as a consideration of the contract applied for, each of which statements and answers, whether written by his own hand or not, every person accepting or acquiring any interest in the policy hereby applied for adopts as his own, admits to be material, and warrants to be full, complete, and true, and to be the only statements given to the company in reply to its inquiries and upon which, should the insurance applied for be granted, the company's contract will be founded.

That by reason of said false and fraudulent statements and representations and each of them the said policy of insurance was and became utterly null and void and the said warranty was broken.

And for other and further answer defendant avers that a material fact stated in the said application for the said policy and which was thereby agreed to be the basis for the said insurance, and also stated

43 in the said policy, was untrue; that the said party who- life was insured under the name of Michael O'Brien was Michael O'Brien, contractor and farmer, residing at Lockford, in the county of San Joaquin, State of California, whereas said party so insured was not the said Michael O'Brien, whose full name was Michael James O'Brien, but another party whose name is unknown to defendant, who falsely and fraudulently simulated and assumed

the personal identity of the said O'Brien and pretended to be that person for the purpose of imposing upon defendant, who was not acquainted with the said Michael O'Brien and was ignorant of his personal identity, and inducing the defendant to issue the said policy to and falsely personating the said O'Brien and issue the same under the belief that he was the said O'Brien and with the intention to insure the life of said O'Brien only and not that of any other party.

And defendant further avers that the representations and statements in the said application so made by said party pretending to be the said Michael O'Brien and falsely personating him were false, not only in respect to said sham personation, but also because they were each and all false in the condition, circumstances, age, ailments, symptoms, and exemptions from disease which they represented as applying to said Michael O'Brien.

And, further answering, defendant avers upon information
44 and belief that the Michael O'Brien referred to in plaintiff's
said complaint as having died on the 15th day of September, 1883, at the city of Boston, State of Massachusetts, never appeared for examination before the medical examiner of this defendant and was never insured by this defendant.

And, further answering, this defendant avers that said Michael O'Brien, at the time of making and presenting said application and at the time of the issuance of said policy, was an invalid afflicted with a mortal and incurable disease, to wit, a disease of the lungs and throat, commonly known as and called consumption, and had already reached the later stage of that disease, whereby and in consequence of he was not an insurable subject, and under the terms and conditions of said application and said policy could not contract for or receive a valid policy of insurance on his life from defendant.

And, further answering, defendant avers that the said policy of insurance was issued in consideration and on the faith of the agreements, statements, representations, and declarations contained in said application; that the signature of Michael O'Brien to "form A" thereof and to "form B" thereof, by means of which the said
statements, representations, declarations, and agreements
45 were verified, affirmed, and rendered binding, said signatures
and each of them purporting to be made and said application thereby also purporting to be made by the said Michael O'Brien, was a false and forged signature, never signed or made by the said Michael O'Brien, and neither said signatures nor the said application was ever signed, made, or drawn, or issued, or authorized, or ratified by the said Michael O'Brien.

And, further answering, the defendant avers that all of the statements, representations, declarations, and agreements hereinabove set forth and mentioned and contained in said application are and were material to said risk of insurance, and it was upon the faith of the truth and genuineness of said statements, representations, and agreements that the defendant issued and delivered its said policy of insurance.

That the defendant, at the time said application was made and

at the time said policy was issued, did not know of the falsity and untruthfulness of said statements, representations, and declarations; otherwise it would not have issued its said policy; that, as defendant is informed and believes, the plaintiff, at the time said application was made and said policy was issued, knew of the false personation hereinabove mentioned and of the falsity and untruthfulness of the statements, representations, and declarations hereinabove set forth and in said application contained, and that the said
46 Michael O'Brien was not an insurable risk, and that there was no consideration for said policy.

Wherefore, having fully answered, defendant prays to be hence dismissed with its costs.

ESTEE & WILSON,
Attorneys for Defendants.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

John F. Ferris, being duly sworn, deposes and says that he is the duly appointed and acting agent of the defendant in the above-entitled action; that he has heard read the above and foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to these matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

That affiant makes this affidavit for the reason that *as* officer of the defendant resides within the city and county of San Francisco, where its attorneys reside, and the facts as above set forth are all within the knowledge of affiant.

JOHN F. FERRIS.

Subscribed and sworn to before me this 6th day of May, 1885.
[SEAL.] J. H. BLOOD,
Notary Public in and for the City and County of San Francisco, State of California.

47 (Endorsed:) Answer to amended complaint. Service of the within answer admitted by copy this 6th day of May, 1885. Chas. J. Swift, attorney for plaintiff. Filed May 6th, 1885. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

48 *Verdict.*

U. S. Circuit Court, District — California.

MICHAEL CROTTY
vs.
UNION MUTUAL LIFE INSURANCE COMPANY. }

We, the jury, find in favor of the defendant.

MARTIN J. BRADBURY, *Foreman.*

(Endorsed:) Filed July 22, 1886. L. S. B. Sawyer, clerk.

49 *Judgment.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of California.

MICHAEL CROTTY
vs.
UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE (a Corporation). } No. 3547.

This cause having come on regularly for trial on the 20th day of July, 1886, being a day in the July, 1886, term of said court, before the court, Honorable George M. Sabin, U. S. district judge of Nevada, presiding, and a jury of twelve men duly impaneled, C. J. Swift and George Flournoy, Esqs., appearing on behalf of the plaintiff, and M. M. Estee and R. E. Wilson, Esqs., on behalf of the defendant, and the trial having been proceeded with upon the 21st and 22nd days of said month and term, and witnesses on the part of the plaintiff having been sworn and examined, and the plaintiff having rested, and the court having, upon motion for the defendant, instructed the jury to find in favor of the defendant, and the jury having thereupon rendered the following verdict:

"We, the jury, find in favor of the defendant."

And the court having ordered that judgment be entered 50 herein in accordance with said verdict, and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that plaintiff take nothing by this action; that the defendant go hereof without day, and that the Union Mutual Life Insurance Company of Maine, said defendant, recover from Michael Crotty, said plaintiff, its costs in this behalf expended, taxed at $53.70.

Judgment entered July 22, 1886.

L. S. B. SAWYER, *Clerk.*

(Endorsed:) I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause. Attest my hand and the seal of said circuit court this 22 day of July, A. D. 1886. (Seal.) L. S. B. Sawyer, clerk. Filed July 22d, 1886. L. S. B. Sawyer, clerk.

51 *Clerk's Certificate to Judg't-Roll.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

M. CROTTY
vs.
UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE. } No. 3547.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit within and for the district of

California, do hereby certify that the foregoing papers, hereto annexed, constitute the judgment-roll in the therein-entitled action.

Witness my hand and the seal of said circuit court this [SEAL.] 22nd day of July, A. D. 1886.

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON, *Deputy Clerk.*

(**Endorsed**:) Judgment-roll. Filed July 22d, 1886. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

52 *Pl'f's Bill of Exceptions.*

In the Circuit Court of the United States, Ninth Circuit and District of California.

MICHAEL CROTTY, Plaintiff,
vs.
UNION MUTUAL LIFE INSURANCE CO. OF MAINE, Defendant.

Plaintiff's bill of exceptions.

Be it remembered that this cause came on regularly for trial in said court on the 20th of July, A. D. 1886, before Hon. G. M. Sabin and a jury, in the court-room of the said United States circuit court, in the Appraiser's building, in the city and county of San Francisco, and following days, in which the following proceedings took place—

Geo. Flournoy, Esq., and Charles J. Swift, Esq., appearing as attorneys for plaintiff, and Estee and Wilson, Esqs., appearing as attorneys for defendant:

The plaintiff, to maintain the issues on his part, before impannelling the jury, moved the court that the defendant be required to designate its line of defence, on the ground that there were three separate defences set up in their answer, and that two at least were utterly inconsistent with each other, to wit: The first proposition as to the matter set up is that the party they supposed they were insuring was falsely represented to the company or its agents by some person to them unknown; 53

And the next proposition is that the party they insured was in a bad condition of health and was not an insurable subject; that he made false representations on that subject to the defendant or their agents, and that in answer to a great variety of questions which were recited in the answer he made what they were informed to be false statements.

Defendants also deny the indebtedness of the insured to the beneficiary at the time of the insurance.

As to the first-named defenses—first, that the party was falsely impersonated, and secondly, that he was in bad condition of health and not insurable and had made false representations to procure his insurance—we are entitled to have them declare which line of defense they adopt on the trial. The court, intimating that it would deny this motion, after argument on the part of the defendant, put the motion in the following shape, so the plaintiff could except:

"Motion to compel the defendant to elect as to the first or second defense denied." To which order and ruling of said court—

(*Plaintiff's First Exception.*)

plaintiff, by his counsel, did then and there except.

In the afternoon session and upon the formation of the
54 jury, Mr. Flournoy, on behalf of the plaintiff, proposed an amendment to the complaint as follows: That at the time of the issuance of said policy the said Michael O'Brien, by and with the consent of the said defendant, transferred and assigned the same to this plaintiff upon the face of said policy, and it was agreed therein between the said defendant and the said Michael O'Brien, the insured in said policy, and the said plaintiff, by and with the consent of the defendant, that if the said Michael O'Brien should thereafter die before the 15th day of January, in the year 1941, the said plaintiff, if living, would be paid the entire amount of said policy, and the obligation to pay the same by the said defendant to the said Michael Crotty was then and there, to wit, on the 22nd day of January, 1883, undertaken and promised in said policy; that said Michael O'Brien died on the 15th day of September, 1883, in the city of Boston, State of Massachusetts, and departed this life, and that good and sufficient proofs of death of said Michael O'Brien as aforesaid were duly and properly furnished said defendant on the 14th day of January, 1884, and that the said ten thousand dollars being due and owing to the plaintiff, but to pay which to said plaintiff the defendant has hitherto refused and still refuses to pay the same or any part thereof, and therefore he prays judgment for that amount against the defendant, together with interest, as the same became due and payable, at the rate of 7 per cent. per annum until paid, and for his costs of suit.

55 Mr. Flournoy stated that he made this amendment because that the policy in this case was a creditor's policy, made payable to Crotty in case of the death of the party insured, or to Crotty's executors, in the sum of $10,000.00.

The court remarked that whether it was a transfer or assignment that he thought that the policy settled that question, and that he didn't think that the amendment would aid the plaintiff, but that "the legal effect of that is to give you the right to recover beyond any question."

"Mr. FLOURNOY: I think so; and to recover as assignee.

"Mr. ESTEE: We do not propose to make any point on that. If they are entitled to recover, of course they are entitled to recover as creditors. There is no question about that.

"The COURT: And the policy so reads.

"Mr. FLOURNOY: The construction of the case in Otto that I speak of is not upon the theory of being a creditor, but the theory of being an assignee.

"The COURT: Yes; and here the defendant has contracted, as it had a right to do, that upon the death of the party insured it would pay to Michael Crotty the amount named in the policy, and they cannot avoid that on the ground that it is not an assignment or that they have not contracted to pay him. They must pay him.

"Mr. FLOURNOY: If your honor takes that view of it, we are content.

56 "The COURT: I think that the amendment is unnecessary. I do not think it strengthens your case at all.

"Mr. FLOURNOY: Your honor thinks that we would have the same right under the present allegation that we would have under this?

"The COURT: Yes; I will give you that right.

"Mr. FLOURNOY: We are entirely content if that is the idea of the court."

Whereupon Mr. Swift made the opening statement to the jury of plaintiff's case.

Testimony for Plaintiff.

Plaintiff offered in evidence the policy of insurance and the original application for insurance by the insured and the medical examiner's original report and examination, being the same as Plaintiff's Exhibit- A and A 1, F. D. M., d'p'y cl'k, which were respectively marked Plaintiff's Exhibit- 1 and 2, set forth in the complaint, in medical examiner's report, where the following language is contained:

(For additional remarks by medical examiner, see letter to B. R. S.; which letter, etc., is as follows, to wit:)

"SAN FRANCISCO, *Jan'y 22nd*, 1883.

Dr. Thos. A. Foster, medical director, 'Union.'

MY DEAR DOCTOR: I have thought it might be well to drop a line with reference to an applicant just examined, as he is another O'Brien, brother of the one that died from pneumonia some
months since. His home is in Lockford, where he has a
57 ranch. He is a contractor and a bricklayer by trade. He is
down here on a visit to his brother as well as on business. I
imagine his brother here urged him the step. If there is any difference I would say this is one of the best of the lot in every way. He takes more after the Sullivan family in appearance than the O'Briens. You will see by the application what he is. Having our recent experience in mind I have been, if possible, more thorough in my search for indications of disease. I can only say we could have a thousand just such.

I am very truly yours, BENJ. R. SWAN.

Objection was made on the part of the defendant, by its counsel, to the introduction of the policy of insurance unless counsel will state to the court that he proposes to offer in connection with the policy the application, which, by the terms of the policy itself, is made a part of it; which was agreed to, the court holding that it made one contract, and defendant's counsel insisting that the application, marked Plaintiff's Exhibit 2, was a part of the policy and all it contained.

Whereupon the original of Plaintiff's Exhibit 2 was tendered to counsel for the plaintiff and offered in evidence by the plaintiff, the reading of the same being waived by counsel for the defendant, the court holding and counsel on the other side agreeing that counsel on either side could read whatever portions of it they desired, 58 & 59 and that the same was in evidence for all purposes.

It was admitted that the policy was the original document issued and delivered by the defendant. It was also admitted that the application was the document upon which the policy was issued.

Mr. Wilson: Of course it is understood that by the introduction of this application and our not making any objection to it that we do not admit its genuineness, or that we waive any right that we have under the pleadings to object to it.

The Court: You can attack it in any way you choose.

Plaintiff, by his counsel, also offered in evidence Plaintiff's Exhibit 3, in words and figures as follows, to wit:

State of California, }
City and County of San Francisco, } *ss:*

I, William T. Sesnon, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court thereof (which court is a court of record, having a seal), do hereby certify that Lee D. Craig, Esquire, whose name is subscribed to the annexed jurat, was at the time of signing the same a notary public in and for said city and county, duly commissioned and qualified and authorized by law to administer oaths, etc., and full faith and credit are due to all his official acts as such notary.

And I do further certify that I am well acquainted with the handwriting of said notary public and verily believe that the signature to the said annexed jurat is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of the said superior court, at my office, in said city and county, this 14th day of January, A. D. 1884.

[seal.] WILLIAM SESNON,
County Clerk and ex Officio Clerk of the Superior Court.

No. 1.

Claimant's Certificate.

To be filled out by the party to whom the insurance is payable.

Notice is hereby given to the Union Mutual Life Insurance Company of Maine that Michael O'Brien has died; that deceased was the same person whose life was insured by said company under policy 76873; that all premiums due upon said policy prior to his decease had been duly paid; that said deceased did not violate any of its conditions; that the undersigned is the legal owner of 60 said policy, and in proof of claim doth hereby submit the following certificates and affidavits:

1. Claimant's name and residence? Michael Crotty, # 1760 Ellis street.

2. Number, date, and amount of policy? No. 76873; date 31st January, 1883; $10,000.

3. In what capacity or by what title do you make the claim? As creditor and beneficiary named in the policy.

4. Name of deceased in full? I knew him as Michael O'Brien.

5. How long had you known deceased? Since July, 1876.

6. Residence of deceased since above policy was issued? Near Lockford, San Joaquin county, California, and Boston, Mass.

7. The several occupations of deceased since the above policy was issued? Bricklayer and brick contractor and farmer.

8. Place and date of birth of deceased? Boston, Mass.; 25th day of December, 1855.

9. Whence is the date of birth derived—from family record, certificate of birth, or otherwise? From his own statement and
61 his brother, T. W. O'Brien, of San Francisco, California.

10. Place and date of death? Boston, Mass., 3 Emerald street, Sept. 15th, 1883.

11. *a.* Remote cause of death? *a.* I don't know.

b. When did health of deceased first begin to be affected? *b.* I don't know.

c. Immmediate cause of death? *c.* I don't know.

d. Duration of last illness? *d.* I don't know.

e. Give every particular in relation thereto within your knowledge. *e.* I only know that he left California and went to Boston, Mass., about April, 1883, and was sick with cold settled on his lungs.

12. Name and residence of every physician who attended or prescribed for deceased during the last year prior to death or since he became out of health. Dr. John G. Blake, Boston, Mass., the only one that I know of.

13. *a.* Did the deceased violate any condition of the above-mentioned policy in respect to residence, travel, occupation, duelling, suicide, or violation of law? *a.* Not that I know of. I think not.

62 *b.* Did deceased ever use spirituous liquors? *b.* I think not.

c. To what extent? *c.* To no extent that I know of.

14. In case of coroner's inquest, furnish the company with the verdict of the jury, and all the evidence on which such verdict was based. He died in Boston, Mass., and I am informed that there was no inquest.

15. *a.* Had the deceased at any time any other insurance? If so, state in what companies, for what amounts, and the dates of the policies respectively. *a.* Yes, New York Life Insurance Company, for $5,000.00, dated 5th day of Feb'y, 1883.

b. What policies are now in force? *b.* This one and the said New York life.

16. What heirs did the deceased leave? Give the name and age of each. An adopted son, Wm. O'Brien, 8 or ten years of age. He

also left two brothers, I. W. O'Brien, Cal., and J. F. O'Brien, Mass., of respectively 39 and 50 years.

63 **17. If the claim is made under an assignment, give the date, name of assignor, and the consideration. The claim by me as creditor of deceased and beneficiary named in the policy.**

(Signed) MICHAEL CROTTY.

Oath.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

On this ninth day of January, A. D. 1884, personally appeared before me the above-named Michael Crotty, to me personally known as the claimant, and made oath that the answers by him above made and subscribed in my presence are true and full to the best of his knowledge and belief, and that he has concealed no material fact from the company.

[SEAL.] LEE D. GRAIG,
Notary Public.

64 No. 2.

Attending Physician's Certificate.

All answers must be in the physician's own handwriting.

1. How long have you practised as a physician, and where did you receive your medical education? 23 years; Harvard University.

2. Name of deceased? Michael J. O'Brien.

3. Place and date of death? 3 Emerald St., Sept. 15, '83.

4. How long had you known deceased? Six months, more or less.

5. *a.* How long have you been the usual medical adviser of deceased? *a.* Six months, more or less.

b. Were you the attending physician during the last illness of deceased. *b.* Yes.

6. *a.* What had been the several occupations and—— *a.* ——.

b. Places of residence of deceased? *b.* Don't know; said to have come from California.

7. Duration of last illness? Cannot say definitely; a year, more or less.

8. Date of your first visit or prescription in last illness? April 27th, '83.

65 9. Date of last visit? Aug't 20, '83; saw him only three times altogether.

10. *a.* State the remote cause of death. If from disease, give the predisposing causes, date of the first appearance of its symptoms, its history, and the symptoms present during its progress. *a.* Died of phthisis; should say the disease existed for at least one year. When I saw him he was far advanced in it.

b. State the immediate cause of death. *b.* Exhaustion.

c. If from any cause other than disease, state the medical and other facts connected therewith. *c.* None.

d. Was a post-mortem examination made? By whom and with — results? *d.* No.

11. Had deceased ever any other disease, acute or chronic; or had he ever had any injury or infirmity? Don't know; saw him for the first time as above stated; knew nothing of previous 66 history; learned — friends that he had had pneumonia one year before his death.

12. Was there anything in the habits or mode of life of the deceased predisposing to disease; if so, what? Don't know.

13. Did deceased use any spirituous liquors? Don't know.

a. To what extent? *a.* ——.

b. With what effect? *b.* ——.

14. State the apparent age of deceased. Appeared to be about 40.

(Signed) JOHN G. BLAKE.

Oath.

STATE OF MASSACHUSETTS, }
County of Suffolk, } *ss:*

On this eight day of December, A. D. 1883, personally appeared before me the above-named John G. Blake, to me personally known as a physician in regular standing, and made oath that the answers by him above made and subscribed in my presence are true and full to the best of his knowledge and belief, and that he has concealed no material fact from the company.

CHESTER W. CLARK,
Justice of the Peace.

67 COMMONWEALTH OF MASSACHUSETTS, }
Suffolk, } *ss:*

CLERK'S OFFICE OF SUPERIOR COURT.

I, Jos. A. Willard, clerk of the superior court for said county, the same being a court of record, do hereby certify that Chester W. Clark, Esq., whose name is subscribed to the proof or acknowledgement of the annexed instrument in writing, was at the time of taking such proof or acknowledgement a justice of the peace in and for the said county, duly commissioned, sworn, and authorized to take the same; and, further, that I am well acquainted with his handwriting and verily believe that the signature to the said proof or acknowledgement is genuine; and, further, that the annexed instrument is executed and acknowledged according to the laws of said Commonwealth.

Witness my hand and the seal of said court, at Boston, in said county and Commonwealth, this 27th day of December, A. D. eighteen hundred — eighty-three.

[SEAL.] JOS. A. WILLARD, *Clerk.*

68 No. 3.

Friend's Certificate.

(Who must be a responsible householder.)

1. Name of deceased in full? Michael O'Brien.
2. Residence? 3 Emerald street, Boston.
3. Occupation? Don't know; came from California, and had not been here long.
4. Date and place of death? 3 Emerald St., Boston, Sept. 15, '83.
5. *a.* Cause of death? *a.* Don't know; said to have been consumptive.

b. Who was the attending physician? *a.* Dr. John G. Blake.

6. Was the deceased insured in the Union Mutual Life Insurance Company of Maine? He is said to have been so insured, but I never saw the policy, and cannot so state positively.

Number, date, and amount of policy? No. —; date, —; $—.

7. Do you know the deceased to be the person insured by the above-named policy by the name above given? No; I only
69 know he was Michael J. O'Brien; came from California, and died at 3 Emerald St.
8. Have you any interest in the above policy? A. No.

(Signed) NAIL O'NEILL.

Oath.

STATE OF MASSACHUSETTS, }
County of Suffolk, } *ss:*

On this twenty-sixth day of December, A. D. 1883, personally appeared before me the above-named Nail O'Neill, to me personally known as a householder, and made affirmation that the answers by him above made and subscribed in my presence are true and full to the best of his knowledge and belief, and that he has concealed no material fact from the company.

CHESTER W. CLARK,
Justice of the Peace.

No. 4.

Undertaker's Certificate.

1. Name of deceased? Michael J. O'Brien.
2. Residence and occupation? Unknown.
3. Date of birth? Unknown.
4. Date and place of death? Sept. 15, '83., 3 Emerald St.
5. Give the cause of death as reported to you. Phthisis.
70 6. Give general description of body of deceased, specifying particularly the height, in feet and inches. About 5 ft. 8 in.; body very much wasted.
7. Did you inter the deceased? When and where? I did; Sept. 17th; Holyhood Ave., Brookline.
8. Do you know the body interred by you to be that of the person named by you as the deceased? I do.

9. Your residence and post-office address? John A. Lloyd, 110 Castle St., Boston.

(Signed) JOHN A. LLOYD.

Oath.

STATE OF MASSACHUSETTS, }
County of Suffolk, } *ss:*

On this seventh day of December, A. D. 1883, personally appeared before me the above-named John A. Lloyd, to me personally known as an undertaker, and made oath that the answers by him above made and subscribed in my presence are true and full to the best of his knowledge and belief, and that he has concealed no material fact from the company.

CHESTER W. CLARK,
Justice of the Peace.

71 This blank is furnished (upon application) for the convenience and assistance of the representatives of the insured, and the company reserves the right to consider and determine the question of its liability under any policy without prejudice or presumption by reason of the delivery hereof.

Instructions.

Each of the within certificates must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signatures must be attested by the clerk of a court of record under his official seal.

If the oath be administered in a foreign country, the official character of the person administering the same, or the clerk or other officer of a court certifying thereto, must be authenticated by a consul or minister of the United States residing in such foreign country.

No. 1.

Claimant's certificate is to be executed by the person legally entitled to receive the money, who must state by what title he or she makes the claim, whether as the beneficiary named in the policy, or as executor or administrator of a deceased beneficiary, or as guardian or other legal representative of a minor, or as a trustee or as an assignee.

72 When a policy has been assigned a sworn*ed* statement of interest must be made, and a properly authenticated copy of the assignment must be presented with proofs of death.

Executors, administrators, and guardians must send certified copies of their appointment and certificate of qualification. Trustees, unless named in the policy, must exhibit their authority.

When a policy payable by its terms to one beneficiary, if surviving, has, by the death of such beneficiary, become payable to another, proof of the death of the first beneficiary must be furnished by affidavit of respectable persons well acquainted with such deceased beneficiary.

When a policy is payable to the children in general of a person, or to any other class of persons whose names are not separately mentioned in the policy, proof must be furnished of how many children there are or of how many the class consists, and the name, residence, — age of each of the persons given, and if married, to whom.

No. 2.

Attending physician's certificate is to be executed by the physician attending the deceased in his or her last illness. If more than one physician were employed, the certificate of each must be obtained The entire certificate must be in the handwriting of the physician.

No. 3.

Friend's certificate is to be executed by some responsible householder intimate- acquainted with the deceased, cognizant of his or her death, and not interested in the claim.

73

No. 4.

Undertaker's certificate is to be executed by the undertaker or sexton who interred the deceased. If necessary, it may, with slight change, be executed instead by the clergyman who officiated at the interment.

Miscellaneous.

In cases of death from diseases of the brain or from insanity, full particulars as to cause and duration of these diseases, and information as to habits of deceased, will be required.

In cases of suicide a certified copy of the verdict and of the evidence on which said verdict is based, before coroners, will invariably be required, and in all cases of sudden death, especially from unknown cause, the particulars and result of any investigation held in the case will be required.

Much delay in submitting proofs of deaths to the committee on losses, and consequently in the settlement of just claims, will often be saved, if the agents, when forwarding the proofs of death, will invariably inform us if the premiums have been paid up to or beyond the date of death.

Every *person* must be distinctly and fully answered, and the company reserves the right to ask any further questions necessary under the circumstances of any particular case.

74 (Endorsed :) Crotty *v.* N. Y. Life Ins. Co. No. 3332. N. B.—this blank is to be filled at the company's office. Plaintiff's Exhibit 4. F. D. M., d'p'y cl'k. Death claim No. —. Policy No. 76873. Amount, $10,000. Proofs of claim submitted to the Union Mutual Life Insurance Company of Maine. Life of Michael O'Brien. Place of death, Boston, Mass. Time of death, Sept. 15, '83.

Cause of death, —. Crotty *v.* U. M. L. Ins. Co. 3547. Pl'ff's Ex. 3. F. D. Moncton, d'p'y cl'k.

The intervention of brokers or commission men is unneces-ary in the collection of claims by death from this company.

Approved claims will be paid when due without charge or expense to the claimant for collection.

75 We have examined the within proof of loss.

[Seal President U. M. Life Ins. Co., Jan. 26, 1884.]

—— ——, *President.*

Consumption.
Sick a year or more.

THOS. A. FOSTER,
Medical Examiner.

1st semi-annual prem. due 1–15, '83, paid 2–18, '83.
2nd " " " " 7–15, '83, " 7–14, '83.

Dr. cert'f. states his opinion that party must have been sick at least one year.

S. S. BAYDEN, *Act. Dep't.*

Referred, Jan'y 26, 1884, to Pres't De Witt, with power.

HENRY L. PAINE,
MARQUIS F. KING,
THOS. A. FOSTER,
Committee on Losses.

Before forwarding proofs see that all blanks are filled and every question*ed* answered, and also that the instructions are strictly carried out, thus avoiding delay and insuring prompt action on the claim.

76 It was also admitted that said foregoing proof of death and claim was admitted by defendant to be the one furnished by plaintiff and delived to the defendant.

Testimony of CHARLES J. SWIFT, called for plaintiff, first being duly sworn, deposes and says:

"The COURT: The ruling of the court is that if the counsel are sworn in the case they will not be permitted to sum up to the jury unless the matter is waived by the other party.

"The WITNESS: I do not intend to, anyway. I appreciate the position.

" Mr. ESTEE: We do not object to Mr. Swift's arguing the case.

"By Mr. FLOURNOY: What are those papers attached to that policy, Mr. Swift?" (Referring to the receipt in words and figures as follows, to wit):

$109.20. Union Mutual Life Insurance Co., No. 76873.
Portland, Me.

Received, this 31st day of Jan'y, 1883, one hundred and nine dollars 20 dollars from the owner of policy No. 76873, on the life of

Michael O'Brien, being one-half of the annual cash premium on said policy, hereby continuing the insurance thereunder for six months from above date, subject to all the provisions of said policy.

77 Policy-holders are reminded that the agreement is mutual (see application and policy); that if the premium is not paid on or before the day it becomes due the policy becomes void, except so far as it may be kept in force by the non-forfeiture law; that no receipt for the premium is valid except signed by the president or secretary of the company, and that agents cannot, under any circumstances, waive the prompt payment of the premium.

NICHOLAS DE GROOT,
Assis. Secretary.

The other receipt is the same in all respects, except that it is the 15th day of July instead of the 31st day of January, and is signed H. D. Smith, secretary, instead of Nicholas De Groot, assis. secretary.

A. (Referring to the receipts.) Those were the receipts that were on the policy at the time it came into my possession—at the time Mr. Crotty delivered it to me—receipts for premium. I don't know personally who paid the premiums. I think Mr. Crotty paid them. I don't know as to the payment of any of them personally, only from the receipts themselves—the two receipts here, the first one and the second one.

"The COURT (interrupting): The witness can read what the receipts state."

Whereupon witness proceeded to read the receipts.

"Mr. FLOURNOY: The payment of the premium is not denied."

Q. Have you the proofs of death there of Michael O'Brien?

"A. Yes, sir. I prepared it—all of that part sworn to by 78 Michael Crotty, the plaintiff. The second and third page-, that was part of this proof, had to be sent on to Boston—in other words, it had to be sent where the man died. I made out all of this. Mr. Crotty swore to it (referring to that part of proof of claim signed by Crotty and executed in San Francisco). Mr. Crotty swore to the first page, and then the other part of it went on to Boston with this, and all that is recited there took place. It was then returned to me at my office, and so presented to the company. I don't know whether I presented it in person; I think I sent my — up and he presented it."

"I was representing Mr. Crotty in this business—I mean Mr. Crotty the plaintiff here, the same man referred to in the policy. There was no objection ever made to me as attorney for Crotty. As to the proof of death, this paper (referring to the blank form of proof of death) was sent over from Mr. Hawkins' office as the form to be filled in, which the company provided. As I remember, I don't think they had any on hand in the legal office here. I never received any notice of objection to the proof of death, as to its form or substance or otherwise. The form was presented and that receipt was

sent back for it (referring to the receipt in words and figures as follows, to wit:)

E. Hawkins, manager, Union Mutual Life Ins. Co., Pacific coast,
601 California street.

SAN FRANCISCO, CAL., *Jan'y* 14, 1884.

Received of Chas. J. Swift form 123 F, executed in case
79 of policy 76873, life of Michael O'Brien.

E. HAWKINS,
Manager Union Mut. Life Ins. Co..

and I never heard any objection to it in any way.

Cross examination by Mr. ESTEE:

Q. Mr. Swift, can you account for the erasure opposite the words "Name of the deceased in full," on page 1, and where it says, "4. Name of deceased in full. I know him as Michael O'Brien"? I see that has been erased and the word- Michael O'Brien written over it, I think. Can you account for it?

A. Where is that? I remember that it is here.

Mr. WILSON: Near the top.

The WITNESS: Yes, sir; I remember that perfectly well.

By Mr. ESTEE: What was written there originally?

A. I cannot tell you exactly what was written, but I think the full name of Michael O'Brien was written first by me; but when I looked at the policy I saw that the name there was Michael O'Brien, and in reference to the idea of identity and that they might object as to the form of the name, I took and wrote after this erasure which you see there Michael O'Brien, in order that the name here would conform to the name in the policy and application, after having been told that Mr. Hatch had written it Michael O'Brien and the policy being made out in that way.

Q. Now, again, opposite question 16: "What heirs did the deceased leave? Give the name and age of each, etc." What
80 was the erasure there opposite that, if you recollect?

A. Well, I don't know. I- seems to be an F or something; but, anyway, the initials were not right as to that name, and I erased them and put in J. F.

Q. You don't recollect the erasure on that?

A. I can almost see that; it seems to be an F or something. I probably made a mistake in the initial when I first wrote it, and then in reading it over carefully it was corrected and put in as corrected over that erasure. We didn't have but one of those blank forms of proof of death and had to use it in that way.

Q. Opposite question 17, which reads as follows: If the claim is given under an assignment, give the date, name of assignor, and the consideration. A. The claim by me as creditor of deceased and beneficiary named in the policy. Michael Crotty.

A. Yes, sir.

Q. That was written by you?

A. Yes, sir.

Q. For Michael Crotty, who was the principal in the policy?

A. Yes, sir.

Q. Or rather the owner of the policy?

A. Yes, sir. Well, I think, first, the 17th question was this: "If the claim is made under an assignment, give the date, name of assignor, and the consideration." In looking at that language I concluded that that was intended for a regular assigned policy, 81 and if it was, the date of the assignment and all would have to be included. Knowing that this was a creditor's policy, I simply repeated the original language and said, "The claim by me is creditor of deceased and beneficiary named in the policy," which answered the question.

Q. Just as it was intended to be?

A. No, sir; the question propounded was if the policy had been one of strict assignment to give the date of the assignment.

By Mr. FLOURNOY: You never heard any of these matters or objections about it before?

A. No, sir; never.

Testimony of THOMAS M. O'BRIEN, called for plaintiff, being first duly sworn, deposes and says:

I am acquainted with Michael Crotty. He is my uncle. I know about the payment of the premiums as they became due on the policy. I paid the money. I paid this one (referring to the first receipt dated Jan'y 31) when the policy came. Mr. Hatch brought the policy to me in Mr. Swift's office. I am clerk for Mr. Swift, and he brought it to me and I paid him the money. I didn't pay it the day he brought it. I paid the money on both of the receipts at Mr. Crotty's request; he left the money with me. If the money wasn't there my mother gave me the money. I paid them out of Mr. Crotty's money. I paid them to S. L. Hatch, who was the agent of the company at that time.

82 Mr. FLOURNOY: On behalf of the plaintiff, we close.

Whereupon defendant, by its counsel, moved for the court to instruct the jury to find for the defendant.

Mr. ESTEE: We move for a nonsuit—we did not expect that the gentlemen were going to close so soon—on the ground—

First. That they have not shown that Crotty was a creditor; that it is an affirmative proposition, and they must show that.

Second. We denied the genuineness of the applications for insurance. Under our statute, that being denied, it is to be proven, and they have failed to prove that.

Third. We denied that he ever appeared for examination and was examined by the physician. That appeared in the pleadings, and it has not been proven by the plaintiff.

Fourth. They have not shown that Mr. Crotty was the owner of the policy at the time of the death of the deceased or at any other time.

When I spoke of nonsuit, of course, under the practice here, I mean an instruction from the court to find for the defendant. I

don't apprehend, under our practice in the United States circuit court, that a nonsuit as such is recognized.

After argument in support of the motion to instruct the jury to find for defendant and opposing argument thereon by counsel for plaintiff on the grounds that the proof already introduced in evidence was sufficient to show such indebtedness, etc., the court said:

"It seems to me that this motion must be determined upon two points:

83 First. Is it necessary that the plaintiff show that he had an insurable interest?

Second. Is it necessary under the pleadings in this case, the answer denying absolutely the execution by O'Brien of the application, for him to show that O'Brien did sign and execute that application? It seems to me that those two are the controlling points in this matter. It may be conceded that in regard to the interest of the party insuring the life of another that there is a good deal of difficulty or a good deal of divergence in the decisions of the American courts. There is not that uniform harmony in regard to them that obtains in the English courts; but I think this proposition is true, that in regard to all matters of insurance, and especially under the statute of this State—either life or fire or marine—that the party insuring must have an insurable interest. I am not aware of any exception to that. Now, this policy was taken out, it is in evidence here, by the plaintiff in this case. He paid the premium; it was taken out by him as a creditor of Michael O'Brien. The complaint proceeds on that theory, that he was a creditor, and alleges in so many words that he was a creditor; that plaintiff was at the time of effecting said policy of insurance and at the time of the death of the said Michael O'Brien a creditor of the said O'Brien for various sums of money which this plaintiff had at various times advanced to said Michael O'Brien, amounting to several thousand dollars, and as such creditor had a valuable interest in the life of said Michael O'Brien; that is an issue—clear, plain, and positive—tendered,
84 and that is just as clearly and positively denied by the defendant. Now, that issue, I think, must be proven; it must be proven at least to the proportionate degree of the amount of insurance effected. I think, therefore, that on that first point it was and is necessary in this case for the defendant to show that there was a valid, subsisting indebtedness existing between him and Michael O'Brien at the time that he effected this insurance, and that rule is not varied by the fact that this particular policy sued upon is a valued policy rather than a policy of indemnity.

As to the other point, it is conceded and it is the law, anyway, but I do not understand that there is really any dispute between counsel on that point. It is conceded, then, that the application signed by Michael O'Brien in this case and the policy, the two papers, make one contract. The execution of the application by O'Brien is denied under oath by the defendant in this case. I think, therefore, the plaintiff in the case is bound to show that Michael O'Brien did execute that application. It is true here that it is not disputed that

the defendant, as a matter of fact, did issue this particular policy—issue it, as they allege, upon a forged and fraudulent application. Now, I think it devolves upon the plaintiff in this case to show that Michael O'Brien did sign that application. It is urged, of course, that the papers themselves submitted in evidence—the application, the policy, the receipts of payment attached to the policy, and the
85 proof of death—make out a *prima facie* case. I should hold to that view myself, that this is a *prima facie* case. Leaving out the first point raised here, that the creditor must show that he had an insurable interest, it would be a *prima facie* case, were it not that the very basis of the contract—the application made by O'Brien for insurance—is denied under oath. If that, then, be true, then that application proves nothing; and, there being no application shown here by him—no valid application—of course the policy would fall with it, because the two make the contract. I therefore shall deem it my duty to grant the motion and instruct the jury; but, as this matter may be a matter of surprise, and these matters are always in the discretion of the court, plaintiff having rested his case, I will permit the plaintiff, if he desires, to reopen his case and submit such proofs on these points as he may desire.

On the other point, as I intimated before in the argument this morning—the point that the answers were fraudulent, etc., I think is purely a matter of defense; but on this point I feel entirely clear. My ruling is this: I think it devolves upon the plaintiff in this case to show that the relation of creditor did exist at the time this insurance was effected or attempted to be effected. I think it devolves upon the plaintiff to show that the application purporting to be signed by Michael O'Brien was his true, genuine signature; that the signature thereto is the genuine signature of Michael O'Brien, the execution of it having been denied under oath by the defendant.

86 To which order and ruling of the court—

(*Plaintiff's Second Exception.*)

plaintiff, by his counsel, did then and there except.

Mr. Flournoy: In that case I want to enquire of the reporter—I believe he did take down the remarks of the court at the time we offered the amendment, to wit, that whatever recitations were in the policy as to construction, whether an assignment or not, should be utilized on the trial of this case the same as if we had in the amendment.

The Court: There can be no doubt on that point. The authorities read incidentally that touch on that hold that a contract of that kind—it is merely the legal effect, anyway, and not necessary to be pleaded.

Mr. Flournoy: I only want the recitation made in the record.

The Court: The plaintiff should establish a right to recover in this case. I should hold that the defendant could not avoid payment to the plaintiff by reason of there being no absolute assignment, because in the contract of the policy he contracts that he will pay Crotty. The legal effect of that, I apprehend, is tantamount to an assignment.

After the order of the court aforesaid and the plaintiff's exception thereto, plaintiff was granted until the afternoon session of the court to determine what *they* should do, *their* witnesses not being present.

87 Afternoon session.

Mr. SWIFT: We will call Thomas O'Brien, Sr.

The COURT: This motion must be disposed of to keep the record perfect. (To Mr. Swift:) You will avail yourself of the offer of the court and put in evidence.

Mr. SWIFT: We will determine to what extent we will put in evidence.

The COURT: Of course, that will rest wholly with you, as to the extent. The amount of evidence you will put in you will be your own judge of.

Mr. SWIFT: We understand it that the court has announced that we should put in some evidence on certain questions—might put in some?

The COURT: Yes, sir.

Mr. SWIFT: We will avail ourselves of the offer of the court and consider that the motion for nonsuit or to direct a verdict for the defendant is eliminated; or, in other words, we start out *de novo*.

"The COURT: Mr. Clerk, I suppose you have a memorandum of the motion made in your minutes?

"The CLERK: Yes, sir.

"The COURT: Then it will have to be disposed of. Enter this, that the motion is submitted and the court announced that the motion would *we* granted unless the plaintiff should choose to put in evidence upon the point of the indebtedness of O'Brien to the plaintiff Crotty, and also upon the execution of the application by Michael O'Brien. (To plaintiff's counsel:) Now, if you desire to reserve an exception you can do so.

88 "Mr. FLOURNOY: We ask of the court the privilege of putting in testimony upon the execution of the application of Michael O'Brien.

"Mr. SWIFT: We had better call our witness.

"Mr. FLOURNOY: I want the court to allow us to do that.

"Mr. ESTEE: Not on the question of the creditorship.

"The COURT: I will allow you to open your case. The record of the case stands that after putting in your evidence the plaintiff rests. Now, then, there will be a motion on your part to open your case and put in evidence upon the two points upon which the court has ruled.

"Mr. FLOURNOY: No, sir; we propose to put in evidence, if your honor will permit us, upon the execution of the application by Michael O'Brien.

"The COURT: Only?

"Mr. FLOURNOY: Only; and then we are willing to rest the case.

"The **Court**: Then you can renew your motion. The other point I consider quite as strong.

"Mr. **Estee**: That embar-asses us, because that is doing this thing by halves. It is an extraordinary position.

"The **Court**: It is only doing it by halves.

"Mr. **Swift**: It will take but a short time to get this record straight on that proposition.

"The **Court**: The record is entirely straight.

"Mr. **Swift**: The record was straight, but as a matter of courtesy—we understand it is a matter of discretion for the court entirely.

89 "The **Court**: Always.

"Mr. **Estee**: We do not ask anything on that point, but we do submit most respectfully that counsel have no right, after the case is opened for that purpose, to appropriate only such part of the order as may seem favorable to them, for this reason: that it places us in an embar-assing position. They only propose now to introduce testimony upon the one point, and that is upon the signature, and the ruling of the court was upon both the question of the signature and the further question that Michael Crotty was a creditor.

"The **Court**: A beneficiary and a creditor.

"Mr. **Estee**: At the time of the making of the policy.

"The **Court**: I may say here that I deem one point just as vital as the other, and if counsel only propose to introduce evidence on one part I may as well instruct the jury now.

"Mr. **Flournoy**: We understood that the court in the consideration of the interests in the matter allowed us to introduce evidence if we choose. I did not understand that we had to introduce evidence on every proposition suggested by the court, because we may differ with the court about some things and not differ with it upon others. We have a right to execute that discretion in the management of our case under the direction of the court. We would like to introduce that evidence, and we are willing to leave the other question open.

90 "The **Court**: I think they may as well go together. I think one just as vital as the other. It would only prolong the matter. If the court should be in error, it is in your favor, anyway—the error would be greater.

"Mr. **Flournoy**: We do not say that the court was in error upon the first proposition. We have a right to avail ourselves of the courtesy of the court and supply any additional proof we wish. We understand the views of the court, but we may agree with the court upon one proposition and disagree upon another. I think it is a fair indulgence of the discretion of the court to allow us to prove the execution, and rest, if we choose to do it.

"The **Court**: I do not think I ought to occupy the public time and expense. I do not think under the ruling that I have announced here that I should deem your case made out even then.

"Mr. **Flournoy**: I understand that.

"Mr. **Swift**: We want to get the record right.

"The COURT: The record is entirely correct. I do not know what you mean by suggesting errors in the record.

"Mr. SWIFT: Your honor may be right upon one proposition and
not right upon the other. This is a matter in the discretion of the
court, whether we are permitted to reopen our case or not. The
limitation that is put upon the reopening of the case ought not to
be absolute. Supposing that we concede that we can prove
91 the execution of the instrument to be more complete than the
court now understands it to be, then we can renew the dis-
cussion in reference to this motion.

"The COURT: I do not care for any further discussion.

"Mr. SWIFT: We have authorities that we can submit.

"The COURT: I do not know that counsel for plaintiff desires to hear that motion.

"Mr. FLOURNOY: Your honor entertains a motion for a nonsuit and your honor sustained that motion.

"The COURT: I sustained the motion unless plaintiff chooses to put in further proof.

"Mr. FLOURNOY: I did not understand that we were required to answer all the reasons.

"The COURT: I said unless plaintiff should desire to submit evidence on the point of the indebtedness of Michael O'Brien to Crotty, and also upon the execution by Michael O'Brien of the application.

"Mr. SWIFT: Would your honor permit us just a few minutes to show the execution of the instrument, and then let us see where we stand? We might go further and we might not.

"The COURT: You have had three hours to consider on that.

"Mr. SWIFT: Our witness is here and it will not take exceeding
two minutes to do this. It will be very short; we do not wish
to occupy the time of the court and jury, and I am sure, it
being a matter of courtesy and discretion, that we ought,
92 under the circumstances, to be entitled to it.

"The COURT: I think the election ought to be one way or the other upon the points ruled upon.

"Mr. FLOURNOY: I am, personally, perfectly content on that proposition, but it is in deference to counsel that I thought we ought to supply the other.

"Mr. SWIFT: We think that the proof of death relates——

"The COURT (interrupting): I beg pardon; I do not care to have the matter re-argued. You have now had two hours fully to consider on those two points, which I have considered very carefully and which I deem absolutely necessary for a recovery on the part of the plaintiff. If you only wish to establish one of those points, there is no use of occupying the plaintiff's time and expense here.

"Mr. FLOURNOY: The only difference is that in the higher court we would not have to show that your honor was in error on both points.

"The COURT: But in the appellate court error upon one point would reverse the whole thing.

"Mr. SWIFT: But there might be some question as to the proof of the execution, the sufficiency of it, and we would supply that deficiency, and then the only point, if your honor please, in the appellate court would be whether we would have to show this question of indebtedness.

"The COURT: Very true; it remains the same now.

"Mr. SWIFT: That point might be considered. We only ask your
honor to obviate that point, so that we can have our position
93 clear, because the principal thing in your honor's mind is
this, that we are obliged to prove an indebtness.

"The COURT: That you must show an insurable interest.

"Mr. SWIFT: That is the cardinal thing to be considered. Now, this other matter is a matter of form, for which we are ready and prepared to show, if there is any question about it. I do not deem that there is, but we would like at least to cover the question in that way. Your honor deems that it is our duty—that it is incumbent upon us—to show this indebtedness. That is the principal question of law; the other is subordinate and collateral and a matter of form. Now, the only appeal that we make to the court, it being a matter entirely in his discretion, and promising not to consume the time of this court, is, that if there is any question about the execution of the instrument to permit us to show that, and I am sure, if your honor please, inasmuch as it relates to the bill of exceptions and the writ of error that might go up in this matter, that we are not asking this honorable court too much, because that is the vital question in your honor's mind—we might apprehend it to be such; we believe it to be such—and we simply ask, by way of courtesy and discretion, that we, to that extent, should eliminate any question whether there is sufficiency or not of proof as to the due execution
of the instrument; but to couple these two propositions
94 together and say that we must accept the two together conjunctively, or that we will be denied the benefit of either
when this matter is brought before the higher court, it seems to me, if your honor please, that it is putting us in a position that we ought not to be placed in, and we simply ask, as a matter of right and as a matter that appeals to the discretion and courtesy of the court, whether we shall be permitted to do this.

"Mr. FLOURNOY: The suggestion I have to make is this: that if our proof is defective in either one of the particulars—not if is sufficient in either one, but if it is defective in either one—then the ruling of the court would be held to be right. Therefore, while your honor might be adjudged to be wrong in reference to the creditorship and interest proven, it might be held that you were right in reference to the execution of the instrument, it being denied under oath. I do not believe—of course none of us can believe—that if your honor happens to be wrong upon either that the case would not be reversed; but I think your honor ought to allow us to supply that defect, if it is one. It cannot possibly take any length of time.

"The COURT: It would occupy a long time. I anticipate that this very question would occupy two or three days, and then when that is ended we will still have this lack of proof.

"**Mr. Flournoy**: The question of signing the paper?

"**The Court**: I think the paper on its own face carries its assignment.

95 "**Mr. Flournoy**: I did not speak of the assignment. I said the signing of the paper.

"**The Court**: Oh, that occupied a considerable time.

"**Mr. Estee**: It occupied nine days on the last trial.

"**The Court**: I do not know how many days it occupied, but we had experts without number.

"**Mr. Swift**: We would not call but one witness on that point, and simply as to that point. It will not take five minutes to get through with it.

"**Mr. Estee**: If your honor please, I do not think a matter of this kind ever occurred before. Counsel come into court and rest their case. They place us in the position to devote two days to prepare to argue that question before your honor; we have devoted two days in discussing it. Your honor has decided it upon two points. Now, counsel are willing to accept the courtesy of the court in allowing them to come in, although the- had submitted it, unusual as it is, although I will admit that it is the custom of the court to exercise that discretion, but as a rule it is not done—they now, after submitting that case, ask the privilege of what? They ask the privilege to reopen the case and let them introduce testimony. Your honor granted that privilege, and now, when the case is called and we come here prepared to defend this case, we find them saying, 'We are willing to open the case.' In other words, they say to the court, 'We accept the courtesy of the court and are willing to open the case on one point only,' and thus embarrass us.

96 "**The Court**: And when that point is proved they are no nearer their right to recover. Gentlemen, I think you must make your election to proceed, putting such proof as you desire. I think that I must require you to put in proof upon those two points upon which the court has ruled. Of course, the extent of the proof will rest wholly with you, and it will remain then a question of fact for the jury whether upon the proof offered the facts have been established; but I think there should be proof upon those two points, and I do not think that I ought to split this matter up in this way.

"**Mr. Swift**: The extent of the proof you speak of is with us.

"**The Court**: That is lodged in your own discretion.

"**Mr. Estee**: What is the ruling of the court?

"**The Court**: They must elect now whether they put in proof upon those two points, and not split the matter up as to one point and leave the other. If you have any further proof to put in on the part of the plaintiff it must be upon the two points ruled on.

"**Mr. Estee**: You are going to put in proof on those two points?

"**Mr. Flournoy**: Certainly, to such extent as we see fit.

"**Mr. Wilson**: We would like the election to appear in the record.

"**The Court**: The order will be as follows: 'The motion to in-

struct the jury to find for the defendant having been submitted,
97 said motion is granted, unless plaintiff should choose
to put in evidence upon the point of the indebtedness of O'Brien to plaintiff Crotty, and also upon the execution of the application of Michael O'Brien. Thereupon counsel for plaintiff indicating that the desires to put in proof upon those points, the motion is overruled.' You can either of you take an exception."

THOMAS M. O'BRIEN recalled for the plaintiff:

By Mr. SWIFT:

Q. Will you state your name, age, residence, and occupation?

Mr. FLOURNOY: Of course, the nature and extent of the proof, I understand, your honor would not undertake to direct, so that we furnish some evidence of the indebtedness.

The COURT: That always rests with counsel. He may prove his case and rest. The court does not direct how much he may prove of it.

By Mr. SWIFT: What is your name?

A. Thomas M. O'Brien; residence, 1760 Ellis street; occupation, clerk in your office, 306 Pine street; been there over six years; before then I was with Judge Seldon S. Wright and Stuart Wright. I know the plaintiff in this case; he is my uncle; his name is Michael Crotty; he is my mother's brother. My mother is living; knew
Michael *Crotty*, whose life was insured. In reference to
98 this policy, No. 76873, I paid the two premiums upon it
(referring to Exhibit No. 1, claimant's certificate aforesaid). I presented it and got that receipt for it (referring to Plaintiff's Exhibit 3). I got that from Col. Hawkins, who was the manager at that time of the Union Mutual Life Insurance Co. in this city; his office was on California street, corner of California and Kearney; he was manager in this city and State for the defendant.

(Referring to proof of claim:) That is Michael Crotty's signature.

(Referring to Plaintiff's Exhibit A 1, that part known as the medical examiner's report, calling attention to the first page and to the signature designated Michael O'Brien:) That is Michael O'Brien's signature. I know it because I saw him sign it. He signed it when the application was made out, the 22nd day of January, 1883. He signed that signature on the first page in your office, at my desk, 306 Pine street. I saw him sign it. Mr. Hatch, the soliciting agent of the company, was present at that time. He brought that application there at that time. He brought it written out. He had written it all out, except the amount was left blank.

Witness's attention being called to page 1, the lower margin of which reads: "Dated San Francisco, California, this 22nd day of January, 1883, in the presence of Benjamin R. Swan, M. D., medical examiner," says that that was Dr. Swan's signature, and that
opposite is Michael O'Brien's signature. "He signed that in
99 Doctor Swan's office. He signed the first one in your office,
and when he went over to Doctor Swan's he signed the other

in Doctor Swan's office. Dr. Swan's office is on Sansome street, above the State investment. I saw him, Michael O'Brien, sign both of them. I saw Dr. Swan sign right after it was filled out.

Pointing to the handwriting of the application in that part of the application known as the medical examination, witness said: All of that was in Dr. Swan's handwriting, the medical examiner. "I was there when Dr. Swan filled it in, in his office. I went over there with Michael O'Brien. Besides having seen Michael O'Brien sign the two signatures, I say that they are his because I am familiar with his signature. Michael O'Brien at this time lived near Lockford, San Joaquin county, California. He signed that paper, I think, on Monday, between 11 and 12 o'clock."

After cross-examination of witness plaintiff rested.

"Mr. Estee: Counsel announced to your honor a half an hour ago, after introducing all these documents, that they proposed to proceed and prove the two propositions, namely, the signature of Michael O'Brien, and next that the plaintiff was a *bona fide* creditor of Michael O'Brien at the time that application was made. No attempt was made to prove that; none at all. The rescitation is there just as it was this morning, and nothing more. It is
100 true that they have introduced testimony as to the signature of Michael O'Brien, but not a word of testimony beyond the introduction of this application and this insurance policy, which is exactly the same character of testimony as it was before. Thomas W. O'Brien, who just left thes stand, only testified to the signature of the application by Michael O'Brien.

"Mr. Swift: This application speaks about the indebtedness and the amount of it.

"The Court: O, yes! An issue is framed on that allegation, that he was a creditor of O'Brien, and the indebtedness is absolutely denied. No evidence is offered on that issue at all.

"Mr. Wilson: As we understand the present status of the parties—that is, the party plaintiff in his relation to this court—it looks to us as though counsel had evaded just exactly what your honor denied them the privilege of doing.

"The Court: It looks to the court that way.

"Mr. Wilson: We feel, under the circumstances, justified in asking your honor to strike out all of the testimony that has been introduced since your honor's decision, and to place the parties back in the same position that they were this morning when your honor made the ruling and under your honor's discretion granted them the privilege of opening their case with the understanding that they should make the proof on those two propositions.

101 "Mr. Flournoy: We did not understand the court to intimate that we had to offer all the proof we might have. We felt content with establishing the validity of this document and the rescitation of it by O'Brien himself of his indebtedness. That we considered a *prima facie* case, and that was the reason we offered it. We may be mistaken, but the evidence is here of the indebted-

ness, and this document is useless for any purpose without the proof given this afternoon.

"The COURT: That is virtually trying to run around the same circle I have ruled on before: that an issue being framed on the indebtedness and raised by the pleadings positively and unequivocally, that evidence must be submitted sustaining that issue.

"Mr. FLOURNOY: We offer it for what we suppose it is worth on that subject.

"The COURT: All that evidence was in before.

"Mr. FLOURNOY: But it was ruled out, as I understood. I understood we had to prove the execution of this application before we could use it for any purpose. The application for insurance is the document which I now speak of. The contents, with what we have already explained, proves the indebtedness.

"The COURT: I do not think so.

"Mr. SWIFT: In a number of cases the Supreme Court of the United States holds that all this is *prima facie* proof—the 102 proof of claim which the company exacts.

"The COURT: I have examined all those cases, and there is not a solitary one that is parallel to this, in this: That either the execution of the application was denied *in toto*—that is, that it was a forgery—or the indebtedness denied. It seems to me counsel are a little inclined to be forgetful that what I laid particular stress on in this case is that the issue tendered to the defendant in this case by your complaint was and is that this plaintiff, at the time of the issuing of the policy, was a creditor of Michael O'Brien. That issue, so tendered, has been denied by them, and upon that it seems to me that testimony must be offered *de hores* that simple application. In connection with this, I certainly endeavored to make myself clear this morning on the points ruled. I think the reporter's notes ought to make it very clear. I endeavored to rule, and explained myself as clear as possible, that I deemed it necessary in this case that the relation of debtor and creditor must be shown to exist between the plaintiff in this case and Michael O'Brien at the time of the execution of this contract. If I failed in making myself clear on that point it was because I have not the power of language to make myself understood. In other words, it must be shown that the plaintiff had an insurable interest in the life of the deceased. That must be shown, as an *an* issue was raised and tendered. Secondly, that the execution of the application for insurance 103 was made by Michael O'Brien. It being denied under oath, proof must be offered in regard to that. Those were the two points I ruled on. As I ruled this afternoon I should not permit the division of these two points, because if one is established it is just as essential that the other should be. This is the memorandum I have; the minutes of the clerk are probably a little more full. Permission was granted to plaintiff, if he chose, to put in further evidence as to the indebtedness of O'Brien to Crotty, and also the execution of the application by O'Brien for insurance in this company. Proof has been given only on the latter point. I do not think the case has been made out any more fully. I will entertain any such motion that counsel may see fit to make.

"Mr. Flournoy: I think I asked the court if we were controlled by the evidence or its extent as to the indebtedness of O'Brien to Crotty. I understood your honor to say you would limit us on that. We offered this because in our view of the law we consider that a *prima facie* proof of indebtedness has been shown.

"Mr. Wilson: 'We move that all of this testimony that has been offered since the ruling of the court this morning, being the testimony of Thomas M. O'Brien on pages — hereof, be stricken out, and that the parties be placed in the same position they were in at the time your honor made the ruling and before they introduced any testimony, then we will renew our motion with reference to the instruction of the jury.'

104 "Mr. Estee: This motion is made upon the ground that we think, with great respect to counsel, it is trifling with the ruling of the court and the rights of the defendant. After counsel had rested originally and after hearing the opinion of your honor counsel proceeded to say that they proposed to introduce testimony on both these points, but introduced testimony on one point only, and then rested. We think that it is not carrying out the understanding at the time your honor allowed the plaintiff to proceed with their case after having once rested. We do not mean any disrespect, but we mean that this is the result.

"Mr. Swift: If your honor please, in answer to that insinuation, we did not intend anything of the kind. Your honor might not have known fully nor are we under obligations to disclose the extent of the meaning of our testimony. Your honor held that we were limited to the point of introducing this testimony for the purpose of showing execution. We think in that connection, when it is brought to the attention of the court, that the fact that this man recites that he is a creditor for ten thousand dollars is a *prima facie* case and binding, nothing to the contrary appearing, and also that the proof of death which relates to the execution of this policy is also our case, and why is it, if your honor please, that we do not propose to go into the proof of this indebtedness. For this reason: We claim that under the very best of adjudicated cases that the proof of death
105 and the introduction of the policy and the application make out our case.

"What is it that the attorney for the defendant wishes to impose on us—to assume that we were not indebted—to accuse ourselves of not being indebted? We say we are prepared upon that in rebuttal, but not in the opening of this case. I hope that your honor will understand that we are prepared for that part of this case in rebuttal, but not at this time. It is not right for us to be misunderstood in connection with this matter. We are prepared to go into the indebtedness whenever they should undertake to deny it or to prove that it does not exist. They mean to put the badge of a self-accusation of fraud and crime upon this man Crotty.

"The Court: Oh, no; it is a rule of law that must be established. You tender them that issue in so many terms by your complaint.

"Mr. Swift: We claim that we have proved, by the policy itself and the proof of death, our case. This very proof of claim is the very thing that the company exacts before they will pay any kind of policy. We have tendered that, and the evidence is before this court that there has been no objection to it either in form or in substance. The proof is in the policy which has been proved to be executed. If that is not sufficient, that it remains in the proof of claim which we have already presented. If we were afraid—if the execution of the instrument, wherein it was said 106 that this indebtedness was ten thousand dollars, was not plain enough the court might decide that point that the evidence was not sufficient that the execution of the paper was made. When the execution of the paper is proven what are the recitals of that paper? They are that he was a creditor for ten thousand dollars. Not limiting it to the recital of the paper, he comes in and says, 'I am a creditor in the amount named in the policy.' There is the proof of death, and that is what the company would have paid this claim upon had there been no contest alleging false representation, or that there was an impersonation of this man Michael O'Brien, which your honor sees, as a matter of defense, are purely for them to set up. If a man says, 'I am not indebted,' when I have a paper which is executed and signed between the parties, he has got to come in and show that—he has got to come in and allege that a fraud exists. We do not propose to assume that we are not indebted. We announce to this court and jury that we are prepared to rebut any testimony that they offer or any insinuations made that we were not indebted, but not in the opening of this case.

"The Court: I think the motion to strike out this testimony should be granted, and it will be so ordered."

Plaintiff's Third Exception.

To which order and ruling of the court plaintiff, by his counsel, did then and there duly except.

"The Court: The case was reopened on the express un- 107 derstanding that counsel would put in evidence on the two points which the court ruled were essential to be proven and established in the case. I announced that I deemed the one as important as the other. Evidence is offered only on one of those points. It may be the view that the counsel may have taken of the matter without any sinister design or purpose whatever, but it seems to be a sort of unfair way of obtaining what the court denied, to wit, putting in evidence on only one point, and it puts the defendant in the very unnecessary and unfair position of being obliged to controvert all of this evidence in regard to the execution of this paper, when, under the ruling of the court, it is all unnecessary. I have ruled that I deemed it necessary that plaintiff must show he had an insurable interest on the life of the deceased at the time he took out the application."

Plaintiff's Fourth Exception.

"Mr. **Swift**: We except to it on the grounds——

"Mr. **Wilson**: I suppose one exception is good for whatever it is.

"The **Court**: The rule is that the parties shall state the ground.

"Mr. **Flournoy**: We except to the ruling of the court upon the
ground that we claim that all the legal testimony, in order to
establish the plaintiff's case at this time, has already been intro-
duced and the indebtedness amply shown by the application, by
the policy, and by the proof of claim and death, there being
108 no objection to the proof of claim or death heretofore made
by the company.

"Mr. **Wilson**: Now, we renew the motion of the day before yesterday that your honor instruct the jury to find for the defendant.

"The **Court**: I suppose no argument is necessary on the motion. It stands just as it did the other day. The motion will be granted."

(*Plaintiff's Fifth Exception.*)

To which order and ruling of the court plaintiff, by his counsel, did then and there duly except.

"The **Court**: Gentlemen of the jury, under the proof offered in this case, I deem it my duty to instruct you that the plaintiff has not made out a case that warrants a judgment in his favor. It is is your duty therefore, under the evidence and the law, to return a verdict for the defendant.

"Mr. **Swift**: We will ask your honor to instruct the jury that under the evidence offered they are entitled to find a verdict for the plaintiff, there being nothing to the contrary introduced by the defendant. Of course I take it for granted that will be refused, but I wish an exception.

"The **Court**: Yes, I could scarcely grant both motions."

(*Plaintiff's Sixth Exception.*)

To which order and ruling of the court plaintiff, by his counsel, did then and there duly except.

"The **Court**: Under the evidence and the law in the case you will find a verdict for the defendant, gentlemen."

109 (*Plaintiff's Seventh Exception.*)

To which instruction plaintiff, by his counsel, did then and there duly except.

The jury, in accordance with the instructions of the court, found a verdict for the defendant as follows, to wit:

"In the Circuit Court of the United States, Ninth Judicial Circuit,
District of California.

Michael Crotty
vs.
Union Mutual Life Ins. Co. of Maine.

We, the jury, find in favor of the defendant.

MARTIN J. BRADBURY, *Foreman.*"

Judgment.

In the Circuit Court of the United States, Ninth Judicial Circuit,
District of California.

Michael Crotty
vs.
Union Mutual Life Ins. Co. of Maine.

"This cause having come on regularly for trial on the 20th of July, 1886, being a day in the July term, 1886, of said court, before the Hon. George M. Sabin, U. S. district judge of Nevada, presiding, and a jury of 12 men duly impaneled, C. J. Swift and 110 George Flournoy, Esqrs., appearing on behalf of the plaintiff, and M. M. Estee and R. E. Wilson, Esqrs., on behalf of the defendant, and the trial having been proceeded with on the 21st and 22nd days of said month and term, and witnesses on the part of plaintiff having been sworn and examined, and the plaintiff having rested, the court having, upon motion of counsel for defendant, instructed the jury to find in favor of the defendant, the jury having thereupon rendered the following verdict: "We, the jury, find in favor of the defendant;" the court having ordered that judgment be entered herein in accordance with said verdict, and for costs:

Now, therefore, by the law and by reason of the premises aforesaid, it is considered by the court that the plaintiff take nothing by this action; that the defendant go hereat without day, and The Union Mutual Life Insurance Co. of Maine, said defendant, recover from Michael Crotty, said plaintiff, its costs in this behalf expended, taxed at —.

Judgment entered July 22, 1886.

L. S. B. SAWYER, *Clerk.*"

Plaintiff's Assignments and Specifications of Error.

I.

The court erred in refusing and denying plaintiff's motion 111 to compel the defendant to elect as to its first or second defence and excepted to in and by plaintiff's first exception herein.

II.

The court erred in its error and ruling referred and excepted to in and by plaintiff's second exception herein.

III.

The court erred in its order and ruling granting defendant's motion to strike out the testimony of witness Thomas M. O'Brien, referred to and excepted — in and by plaintiff's third exception herein.

IV.

The court erred in its order granting defendant's motion that the court instruct the jury to find for the defendant, referred and excepted to in and by plaintiff's fourth exception herein.

V.

The court erred in its instruction to the jury to find a verdict for the defendant under the evidence already introduced by the plaintiff referred and excepted to in and by the plaintiff's fifth exception herein.

VI.

The court erred in refusing the instruction asked by the plaintiff for the court to direct the jury that they are entitled to find a verdict for the plaintiff under the evidence introduced by the plaintiff referred and excepted to in and by plaintiff's seventh exception herein.

112 VII.

The court erred in instructing the jury to find for the defendant, referred and excepted to in and by plaintiff's seventh exception herein.

(Endorsed:) Plaintiff's bill of exceptions as amended, engrossed, and settled the 30 day of August, 1886. Geo. M. Sabin, judge. Filed August 30, 1886. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

113 *Bond on Writ of Error.*

In the Supreme Court of the United States.

MICHAEL CROTTY, Plaintiff and Plaintiff in Error,
vs.
UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE, Defendant and Defendant in Error.

Know all men by these presents that we, C. G. Ames and Owen Keenan, are held and firmly bound unto The Union Mutual Life Insurance Company of Maine, defendant and defendant in error herein, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to said Union Mutual Life

Insurance Company of Maine, its successors or assigns; to the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 17 day of July, 1888.

114 Whereas the above-named Michael Crotty has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered and entered by the circuit court of the United States of America for the district of California in the cause entitled Michael Crotty *vs.* Union Mutual Life Insurance Company of Maine, No. 3547:

Now, therefore, the condition of this obligation is such that if the above-named Michael Crotty, plaintiff and plaintiff in error, shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

C. G. AMES. [SEAL.]
OWEN KEENAN. [SEAL.]

Signed, sealed, and delivered in the presence of—
F. D. MONCKTON.

UNITED STATES OF AMERICA,
Northern District of California, } *ss:*

C. G. Ames and Owen Keenan, being duly sworn, each for himself deposes and says that he is a householder in said 115 district and is worth the sum of five hundred dollars in lawful money of the United States of America exclusive of property exempt from execution and over and above all debts and liabilities.

C. G. AMES.
OWEN KEENAN.

Subscribed and sworn to before me this 17th day of July, 1888, by C. G. Ames and Owen Keenan.

F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern District of California.

(Endorsed:) The form of the within bond and the sufficiency of the sureties thereon are hereby approved. Geo. M. Sabin, U. S. district judge of Nevada, sitting as circuit judge. Filed July 17, 1888. L. S. B. Sawyer, clerk.

116 Circuit Court of the United States, Ninth Judicial Circuit,
Northern District of California.

MICHAEL CROTTY, Plaintiff and Plaintiff in Error,
vs.
UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE, Defendant and Defendant in Error.

I, L. S. B. Sawyer, clerk of the circuit court of the United States, ninth judicial circuit, northern district of California, do hereby certify that the foregoing one hundred and fifteen written and printed pages, numbered from 1 to 115, inclusive, are a full, true, and correct copy of the record and of the proceedings in the above-entitled cause, and that the same together constitute the return to the annexed writ of error.

Seal U. S. Circuit Court, Northern Dist. Cal.

Attest my hand and the seal of said circuit court this 20th day of September, 1888.

L. S. B. SAWYER, *Clerk.*

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Michael Crotty, plaintiff and plaintiff in error, and Union Mutual Life Insurance Company of Maine, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff and plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this 17th day of July, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Seal U. S. Circuit Court, Northern Dist. Cal.

L. S. B. SAWYER,
Clerk of the Circuit Court of the United States of America for the Northern District of California.

The above writ of error is hereby allowed.

GEO. M. SABIN,
U. S. District Judge, District of Nevada,
Sitting as Circuit Judge.

118 [Endorsed:] No. 3547. United States Supreme Court. Michael Crotty, pl'ff and pl'ff in error, *vs.* Union Mutual Life Insurance Company of Maine, def't and def't in error. Writ of

error. Filed July eighteenth, 1888. L. S. B. Sawyer, clerk U. S. circuit court, nor. dist. Cal.

Rec'd copy of the within this 18th day of July, 1888.

ESTEE, WILSON & McCUTCHEN,
Attorneys for Def't and Def't in Error.

119 UNITED STATES OF AMERICA, *ss*:

To Union Mutual Life Insurance Company of Maine, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the eighth day of October, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, wherein Michael Crotty is plaintiff and plaintiff in error and you are defendant and defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Sabin, district judge of the United States for the district of Nevada, sitting as U. S. circuit judge, this 17th day of July, A. D. 1888, and of the Independence of the United States the one hundred and thirteenth.

GEO. M. SABIN,
U. S. District Judge, District of Nevada,
Sitting as Circuit Judge.

120 [Endorsed:] No. 3547. In the Supreme Court of the United States. Michael Crotty, pl'ff and pl'ff in error, *vs.* Union Mutual Life Insurance Company of Maine, def't and def't in error. Citation. Filed July 18th, 1888. L. S. B. Sawyer, clerk U. S. circuit court, nor. dist. Cal.

Rec'd copy of the within this 18th day of July, 1888.

ESTEE, WILSON & McCUTCHEN,
Attorneys for Def't & Def't in Error.

Endorsed on cover: Case No. 13,329. N. California C. C. U. S. No. 248. Michael Crotty, plaintiff in error, *vs.* The Union Mutual Life Insurance Company of Maine. Filed October 15, 1888.

Office Supreme Court U. S.
FILED.
MAR 25 1892.
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 248.

MICHAEL CROTTY, Plaintiff in Error,

vs.

THE UNION, &c., INSURANCE COMPANY.

Brief for Crotty.

S. F. Phillips,
F. D. McKenney,
Attorneys for Crotty.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 248.

MICHAEL CROTTY, Plaintiff in Error,

vs.

THE UNION, &c., INSURANCE COMPANY.

Brief for Crotty.

This is an action, under the forms of the California Code, to recover $10,000, for which the defendant had insured the life of one Michael O'Brien in favor of the plaintiff as his *creditor*. By its answer the defendant denied (amongst other matters) that the " Michael O'Brien " who had been insured was the same person that had died; and also that Crotty was his creditor. These issues, together with a question whether the defendant should not at the trial have been required to make an *election* betwixt two contradictory defenses alleged in his sworn answer, constitute at present the only matters of interest upon the record.

The COMPLAINT (Record, p. 1) alleges that in January, 1883, the defendant had delivered this policy in question upon the life of O'Brien to the plaintiff as O'Brien's creditor; that O'Brien had died in September, 1883, and the plaintiff had thereupon furnished proof of his death, &c., &c. [Sworn to January 2, 1885.]

The policy and application are made a part of this complaint, and the material portions of these papers are as follows:

POLICY (p. 4):

"Union Mutual Life Insurance Company, of Maine, * * * in consideration of the application for this policy of insurance, * * * does promise Michael O'Brien, of Lockford, in the State of California, to pay to said Michael O'Brien the sum of ten thousand dollars * * * on the 15th of January, in the year 1941; or if said Michael O'Brien shall die before that time, to pay said sum * * * to Michael Crotty, his creditor, if living; if not, then to the said Michael O'Brien's executors," &c., &c.: January 31st, 1883. [Not sealed.]

APPLICATION (betwixt pp. 10 and 11):

"Give your full name. *Michael O'Brien.* * * * To whom is the proposed insurance to be paid in case you live to its maturity? *Myself.* * * * To whom in case of your previous death? *Michael Crotty.* * * * Has the beneficiary named herein an interest in your life to the full amount applied for, and if not to what extent? *Yes.* State the relationship of the beneficiary, or how the interest arises? *Creditor.*"

[*Mem.*—The above application was annexed to the complaint by an amendment allowed by the court after a demurrer for want of such application had been sustained. P. 14.]

The answer of the defendant (pp. 14, &c.) denies that Crotty was a creditor of the O'Brien mentioned in the complaint, and also that the O'Brien whose life had been insured by it was the deceased; and avers that he was a person who then and there falsely and fraudulently personated the latter; but its other allegations are not important here.

At the opening of the trial (p. 22) counsel for the plaintiff called the attention of the court to the inconsistency of the answer in this, that it alleged as *one* defense that the party insured was falsely personated—and as *another*, that such party was in a bad condition of health, and not insurable; and thereupon asked that the defendant be required to elect betwixt the two.

This was denied; and the plaintiff excepted (p. 23).

The plaintiff thereupon introduced in evidence the original application and policy, together with the preliminary proofs of the death of O'Brien, and of the capacity and title in which Crotty made claim for the insurance money, as required by the company: in which, amongst other matters, Crotty answered as follows the questions contained in the blanks furnished (" without prejudice," p. 30) by the company: " In what capacity or by what title do you make this claim? *As creditor and beneficiary named in the policy.*" [Repeated substantially under question 17.]

Evidence was also given of the due payment of the premiums.

The plaintiff then closed his case; and the defendant moved the court to direct the jury to find in its favor, upon the several grounds, amongst others, (1) that Crotty had not been shown to be a creditor; and (2) that the genuineness of the application for insurance had not been shown (p. 35).

This motion was granted for both the reasons above stated—the court adding, however, that as this "may be a matter of surprise, and these matters are always in the discretion of the court, plaintiff having rested his case, I will permit the plaintiff, if he desires, to reopen his case and submit such proofs on these points as he may desire;" and after some colloquy (pp. 38, &c.), an order was made accordingly (p. 42, bottom).

Thereupon, after further evidence had been introduced on behalf of the plaintiff, upon the question of *identity* only, the plaintiff again stopped; and the court holding that the setting aside of the nonsuit previously ordered had been upon condition that further evidence should be given upon *both* of the grounds of such nonsuit, struck out the evidence last introduced, and again directed a verdict for the defendant.

Exceptions were duly taken to both parts of such action. (pp. 47, 48.)

Verdict and judgment accordingly; and writ of error.

We assign for error—

1. *The refusal of the court to put the defendant to an election*

betwixt the two contradictory defenses: viz, (*a*), *that the person who signed the application and underwent the incidental medical examination was not the person who had since died* (*p.* 19); and (*b*), *that the person who so applied and was examined was of a not insurable state of health, although falsely represented as being so.* In other words, that the deceased at a certain time and place had made no statements as to his health, and that also at such time and place he had made statements as to his health that were false.

Such inconsistent defenses were allowed at common law, it is true; but under the theories of code pleading, and the obligation of an oath, it would seem that they are not so any longer. However, the point is discussed in Pomeroy's *Remedies*, sections 722 to 724.

Before stating our further assignments of error, we submit that the administration of the case below in regard to setting aside the earlier direction for a verdict, allowing further evidence to be introduced, and in the end striking out the latter and renewing the direction for a verdict, has placed the plaintiff in the same condition as if, before he first closed his case, he had introduced the evidence which afterwards he introduced.

The discretion which the judge chose to exercise in setting aside the earlier direction could not be an *arbitrary* or whimsical discretion. Admitting that he need not to have exercised it at all, yet when he determined to do so, it was necessarily *a legal discretion* that he was to employ: one that could be ascertained to be in furtherance of justice, as "justice" was known in courts of that class. He could not *capriciously, ex. gr.*, impose upon the plaintiff as a condition of such favor any burden of proof that according to law was not necessary in order to entitle him to have the jury (not the court) pass upon the issues. His discretion was a discretion to allow, or not to allow, the plaintiff (because of surprise, &c.) to proceed according to such rules of law as govern persons in regular trials.

This position will probably be granted; and we are not sure that the court intended anything else by what was said or done below; although some things upon the record have suggested the propriety of submitting what has just been said.

When the plaintiff first stopped, the defendant suggested *two* independent grounds for a direction of the verdict. If *either* of these were valid, such direction, upon appeal, would have been affirmed. The learned court did not mean to say that the plaintiff should not be allowed to amend his case in regard to that one of these grounds which he might apprehend to be fatal, at the same time that he might stand his ground upon the other, and apply for a review of any adverse decision therefrom in the court above. The case might be that he had no other evidence upon that point; or that for the purposes of the trial he deemed it more prudent to await disclosures by the defendant before going further thereupon. In either such case the court would certainly not be understood to make the relief allowed in regard to the point that might be amended depend upon impossible or unnecessary, or at least forced action upon the other. For the purposes of justice the two grounds were not *joint*, but *several*, and so equally was the allowance as to them.

Meanwhile, of course, the court could renew its direction of a verdict: either on account of that *ground* which was untouched by the new evidence; or because the new evidence had, in its opinion, made no difference, even as to the other ground.

We assume, therefore, that the case as to the other two assignments of error is to be argued as if the evidence given *after* the court had first intimated its intention to direct a verdict for the defendant, had been introduced *before*. Therefore,—

II. *As a second ground of error we assign the instruction to the jury that the plaintiff had introduced no evidence in regard to the relation of Crotty as creditor of O'Brien.* For,—

1. There is the *admission* upon the face of the policy itself (which made part of Crotty's evidence as well as of his pleading) by words there employed (p. 2, bottom) by the defendant in defining the obligation which it thereby undertook—those now being enforced, viz: "*If said Michael O'Brien shall die before that time, to pay said sum within ninety days after notice and satisfactory proofs of death shall have been furnished to the company at its said office, to Michael Crotty,* HIS CREDITOR, *if living.*" That this is material evidence appears from a well-known passage in the great American authority upon Evidence:

"There is no difference, in regard to the admissibility of this sort of evidence ['Admissions'] between *direct admissions*, and those which are *incidental* or made in some other connection, or involved in the admission of some other fact. Thus, when in an action against the acceptor of a bill, his ation of the jury, on the question of the amount of loss? * * * When introduced it would be evidence for the jury to consider, like other facts in proof. Facts which are inadmissible for the party offering them if objected to, may be competent when put in by consent or without objection. * * * The right of the defendants to require this preliminary proof was not waived by them. They may have supposed that it was for their benefit to require their introduction for some purpose; and when legitimately before the jury no rule of law would prohibit them from giving these papers due consideration in connection with all the evidence in the case." (48 Am. Dec., 519.)

III. *We also assign for error the instruction that no evidence was given as to the identity of the Michael O'Brien who applied for and received the policy in question, and the man who died in Boston on the* 15*th of September*, 1883.

The evidence of *Thomas M. O'Brien*, (pp. 43, 44) seems to be conclusive upon this point.

Even in the absence of that evidence, the ruling upon this point might be criticized. But we submit that it is unnecessary to enquire further into that.

S. F. PHILLIPS,
F. D. MCKENNEY,
Attorneys for Crotty.

Supreme Court of the United States

OCTOBER TERM, 1891.

Term No. 248.

MICHAEL CROTTY, PLAINTIFF IN ERROR,

vs.

THE UNION MUTUAL LIFE INSURANCE CO.

DRUMMOND & DRUMMOND'S ARGUMENT FOR THE DEFENDANT IN ERROR.

PORTLAND:
STEPHEN BERRY, PRINTER.
1892.

Supreme Court of the United States.

OCTOBER TERM, 1891.

Term No. 248.

MICHAEL CROTTY, Plaintiff in Error,

vs.

THE UNION MUTUAL LIFE INSURANCE CO.

Drummond & Drummond's Argument for the Defendant in Error.

This is an action by the Plaintiff, Crotty, as an alleged creditor of Michal O'Brien upon an alleged Policy of Insurance upon the life of O'Brien, issued by the Defendant Company.

In ordinary language, the defence was that it is an instance of what has come to be known as "graveyard insurance," in which the plaintiff, having no interest in the life of O'Brien, secured a policy upon the life of O'Brien, then sick unto death with a fatal disease, by procuring a healthy man to personate O'Brien in the necessary proceedings preliminary to the issue of the policy.

By the policy, the application is made a part of it.
Exhibit A, Record p. 20.

By the Answer, the defences arising under the foregoing statement are pleaded in legal form:

1. The making of a policy upon the life of Michael O'Brien is denied; the genuineness of the alleged signature of O'Brien to the application is denied.

2. The allegations of the complaint that Crotty was a creditor of O'Brien are denied.

3. It is alleged that O'Brien was falsely personated.

4. And that O'Brien was at the time in bad health and not insurable, and that the answers to questions in the application, upon the faith of which the policy was issued, were false.

I. The first specification of error is based upon the denial of the motion of the plaintiff that the defendant should be required to elect which of the affirmative defences it would rely upon, on the ground that those defences are inconsistent with each other.

While this motion and the decision upon it became immaterial, in consequence of the manner in which the trial was subsequently conducted, the plaintiff in error seems to rely upon this specification of error.

It is true, that the Code of California provides that defences "must be consistent."

When "they require in their proof a direct contradiction of any fact elsewhere directly averred," they

are not allowable; but when the contradiction arises by implication of law they are allowable.

Pomeroy's Estee, Sec. 3381.
***Bell v. Brown*, 22 Cal., 671.**

In this case the averment of a false personation, in no manner conflicts with the averments that the answers were false. The answers relate to the one *personated* and not to the false *personator*. If the answers are false, the policy is void, without reference to the question whether they were made by the party proposed to be insured, or by some one personating him.

II. The case finally went to trial upon the issues made up as already stated.

Upon two of those issues, the plaintiff had the burden of proof.

The first issue was upon the allegation of the complaint that the defendant made and delivered to the plaintiff its policy of insurance upon the life of Michael O'Brien.

The second was upon the allegation of an insurable interest in the plaintiff: that allegation was as follows:

"That plaintiff was, at the time of effecting said policy of insurance, and at the time of the death of said Michael O'Brien, a creditor of said Michael O'Brien for various sums of money, which this plaintiff had at various times advanced to the said Michael O'Brien, amounting to several thousand dollars, and as such creditor had a valuable interest in the life of said Michael O'Brien."

These allegations were denied, and the first was denied in such manner that the plaintiff must prove the genuineness of the signature to the application, purporting to be Michael O'Brien's, if the genuineness of that signature was material.

The plaintiff, to make out his case, offered:

(a) The policy; but upon objection made to its admission without the application, and the court's holding that the two made one contract. it was agreed that both should be offered. It was further agreed that the policy offered was the policy issued by the defendant and the application was the document upon which the policy was issued.

The counsel for the defendant stated to the court that of course it was understood that the defence, by not objecting to its introduction, did not admit the genuineness of the application, or waive any right the defence had under the pleadings to object to it, and the court replied, "You can attack it in any way you choose."

Record, pp. 24, 25.

No objection to these statements was made by the counsel for the plaintiff; and in the subsequent proceeding at the trial, it is manifest that the presiding Judge had admitted the papers duly *de bene esse*, and that the plaintiff must satisfy the jury of the genuineness of the signature to the application; and that the mere admission of the document did not dispense with proof that O'Brien actually signed it, if his signature was material.

Record p. 37.

In fact, the plaintiff does not, by his second exception, raise the point that the admission of the application under the circumstances was any waiver, by the defence, of its denial of the genuineness of the signature to the application.

Whenever the issue concerning the genuineness of the signature to a document is tried before a jury the document itself always is, and necessarily must be, admitted in evidence *de bene*, in order for the jury to pass upon it and the evidence in the case.

So far as this issue, then, was concerned, the plaintiff was obliged to adduce evidence to maintain it, if it was necessary to maintain it.

(b) The proofs of death, and evidence that they were delivered to the defendant ninety days before the commencement of the action.

(c) The premium receipts, with proof that Crotty paid the premiums.

The plaintiff then rested.

Thereupon, the defence moved for a non-suit, or a direction to the jury to find for the defendant.

This motion was granted upon two grounds:

That under the pleadings, the plaintiff was bound to prove, but had not offered evidence sufficient to authorize the jury to find, the genuineness of the signature to the application.

That the plaintiff was bound to prove, but had not offered sufficient evidence to authorize the jury to find, that the plaintiff had an insurable interest in O'Brien's life as alleged in the complaint.

The plaintiff excepted to this ruling, and his second specification of errors is based upon it.

1. It seems to us too clear for argument, that as the application and policy together make the contract between the parties, there is no contract if the application is a forged one, and, therefore, that in this case, if the signature purporting to be O'Brien's was a forgery, no policy was made and delivered.

The signature to the application being material, it was necessary for the plaintiff to prove it, if put in issue under the rules of court and the law. In this case, it was not contested that the defendant had taken the necessary steps to put it in issue: the plaintiff being bound to maintain this issue, and having offered no evidence to support it, the Judge, so far as this point is concerned, properly ordered a verdict for the defendant.

2. He also ruled that it was necessary for the plaintiff to prove that he had an insurable interest in O'Brien's life and had offered no proof of it.

The views of courts have been so various in relation to the subject of "insurable interest" in Life Insurance, that we hope to be pardoned for referring to its fundamental principles.

Insurance upon property is designed wholly for entire or partial indemnity against loss.

The amount to be recovered cannot exceed the sum which indemnifies the insurer for his loss. If he has no interest in the property when the contract is made, the policy is void, because he has nothing to lose by the destruction of the property; if he has no interest in it, at the time of its destruction, he cannot recover, because he has lost nothing.

The rule of damages, therefore, is certain and the amount readily ascertained; the money value of the property destroyed or the amount necessary to repair and replace the property injured, is the utmost limit of valid insurance.

Insurance without interest and over insurance are alike invalid as against public policy, not only because such policies are "wager policies," but, also because they encourage the fraudulent destruction of the property insured.

A policy of insurance upon property has no value, except the trifling amount which may be agreed to be returned for unearned premiums, upon cancellation of of the policy before the expiration of its term.

The fundamental idea of life insurance is also *indemnity against loss*. Insurance of life without an insurable interest is equally wager insurance, and moreover encourages the fraudulent destruction of human life; and therefore is as much more dangerous than the insurance of property without an insurable interest, as human life is more precious than mere property. Those familiar with the settlement of death claims know the fact that losses by suicide are alarmingly frequent, while losses by murder are by no means unknown. The difficulty of satisfying a jury in such cases has prevented a court record of a vast number of these cases.

Upon a *business* basis, the limit of insurance upon a man's life is evidently the cash value of his life to the beneficiary. If he is *nominally* his own beneficiary, the *real* beneficiaries are those to whom his estate goes at his decease. But in ascertaining this value there is a difference between property insurance and life insurance; in the former, the loss is susceptible of computation, while in the latter it generally is not; no rule has been discovered for ascertaining the value of a man's life to himself or his family; but when the value of his life to any one arises out of business transactions wholly, it is easily ascertainable.

All the reasons for the rule which forbids a man to insure property which he does not own, or over insure property which he *does* own, exist with almost infinitely more force to forbid his insuring a life in which he has no interest, or over insuring a life in which he has an interest.

There are some differences between property insurance and life insurance which have probably led to decisions by some courts, which can scarcely be reconciled with the principles which we have stated.

In the first place, the contract of life insurance always contemplates the payment, at some time, of the amount insured.

As that is the case, the considerations upon which life premiums are fixed differ from those controlling the fixing of the premiums in case of property insurance.

From statistics, it is ascertained that out of a given number of men of the same age, a certain proportion on the average, die during the first year, a larger proportion the second year, and so on, the proportion of those dying to those surviving increasing each year, until all are dead. The premiums are so fixed, that, with their accumulations, they will pay the expenses of managing the business and accumulate a fund sufficient to pay each policy as it matures.

But the actual cost of insuring a man for a year increases with the age of the insured. In order, therefore, to have the same annual premium *during life*, the premium at first is larger than the cost of insurance, and in old age smaller than the cost. The consequence is that a fund accumulates in the hands of the insurer; this fund is nominally apportioned to the policies, and the amount apportioned to a given policy is called the reserve on that policy.

For purposes of the insurance, therefore, each policy has a value, greater or less, according to the number of premiums that have been paid upon it. In former times, in *all companies*, upon the failure of the insured to perform his contract, this reserve was forfeited to the insurer; and such is the case now in many companies. But many States have interfered by legislaton, and now numerous companies, by virtue of the law, or their own contract to that effect, upon the insured's failing to perform his contract by ceasing to pay premiums, give him some benefit from the reserve on his policy, by an extension of his insurance, by issuing a paid up policy for a less amount, or by the payment to him of a "cash value."

These pecularities of life policies have given them, in the view of the public, a real, pecuniary value, although, in truth, except a policy which provides for "a cash surrender value," they have a value only for the purpose of *paying for future insurance.*

There is also another partial exception in the case of policies, known as endowment policies, payable at a fixed time, although the insured be then living, or at his death if he dies before that time.

The consequence is that the idea very generally prevails that life insurance policies may be used as security for debt, or as subjects of sale, and the further consequence is that they are taken by assignment, or by rewriting with a change of beneficiary, by parties having no interest whatever in the life of the insured, but on the contrary are interested to have him die at the earliest possible moment, and are losing money every day he lives. Surely this, if it is legal, is absolutely reversing the fundamental principle of insurance, that the insured must be interested in the preservation of the subject rather than in its destruction.

Nor is a creditor's policy taken out and paid for by him, *in and of itself*, the least security for his debt: he gains, so far as that is concerned, *only by the premature* *death of his debtor*. If the debtor is in a chronic condition of insolvency, and is to so remain, his creditor's policy is a wager policy of the most dangerous character. But ordinarily in such cases, the creditor believes that if his debtor continues to live, he will, in time, pay the debt. In that case, the creditor does have an interest in the debtor's life, and a policy of insurance stands as indemnity for the loss he would sustain by the debtor's death; but it should stand as indemnity only for his actual loss—that is, his debt and interest, and the amount of premiums paid and interest.

So if the debtor pays the premiums and the creditor's claim is limited to the amount of his debt and interest, there can be no objection to the transaction.

Indeed, it has become the quite universal opinion among those having most to do with Life Insurance, that it should be provided by law, that in no case shall a creditor be permitted to retain from the avails of a policy upon the life of his debtor, more than the amount of his debt, (including interest) and premiums (if any) paid by him, with interest thereon; that the surplus should go to the family or heirs of the insured; and that provisions of a policy requiring him to make proof of his interest under this rule should be binding upon him.

It seems to us that a consideration of the principles and real objects of Life Insurance, in connection with sound public policy, leads inevitably to the conclusion that the well settled rules relating to property insurance, that the insurer must have an actual interest in the subject insured, is equally applicable to Life Insurance.

The earlier decisions were in accord with these views. "The party insuring must have an interest in the life insured" is the rule stated by Chancellor Kent.

3 Kent Com., p. 368.

This rule limits the claim of a creditor to the amount of his debt; applies to an assigner: and if assigned as security for a debt it ceases, as to the creditor, upon the extinguishment of the debt. *Ibid.*

In *Godsall v. Boldero*, 9 East 72, Lord ELLENBOROUGH, had already stated the same doctrine.

This case was afterwards overruled; in the eagerness of companies to do business, they declined to avail themselves of the decision, and secured opinions by those claiming to be learned in insurance, that the basis of the decision was erroneous, and these opinions convinced the court. Indeed, in a note to the case *Dalby vs. Life Assurance Company*, 6 J. Scott, 365, (80 English Com. Law R., 364), in which *Godsall vs. Boldero* was overruled, one of these opinions (Professor De Morgan's) is printed in full. An examination of it in connection with the opinion of the court shows that the court adopted his views, and held that wager policies were valid, except so far as prohibited by *statute*.

It was held that the contract was not an agreement to indemnify the insurer for a loss, but to pay him a certain sum on the happening of a contingency: it is admitted by the court that it was a wager policy, but it was held that at common law *wager policies of life insurance were valid;* that there had been only one limitation by statute (14 Geo. 3, Ch. 48) of the right to issue such polices; that as the court construed that statute, its limitation applied only to the inception of the contract; and that as in the case before the court, the plaintiff had an interest in the life of the insured at the time the policy was made, the fact that he had ceased to have an interest afterwards did not prevent his recovery.

But in this country, wagers are not valid contracts; we believe such is universally held to be our common law, although in most if not all the States, they are denounced by statute. In Maine it is the law that "all wagers are unlawful."

Lewis v. Litchfield, 15 Maine, 233.

[We find upon further examination that in New Jersey, wager contracts are invalid only so far as expressly prohibited by statute, and therefore that wager policies are valid, as they have not been prohibited by statute; so that in that State it is not necessary to prove an insurable interest in an action upon a life policy.

Trenton Mutual Life Insurance Co. vs. Johnson, 4 Zabriskie, 576.]

Does it not follow that all policies are wager policies, in which the beneficiary does not have an interest in the life of the insured?

We know that it was once held that the interest arising from consanguinity and affinity was not sufficient to sustain a contract of insurance, and that doctrine has been overruled. It was properly overruled. The reason is well stated in *Lord v. Dall*, 12 Mass., 115. In that case, a sister dependent on her brother for support insured his life for her benefit; he was under no contract whatever to support her; she could only rely upon his fraternal affection, that he would continue to aid her; the court could not hold that she had no interest in his life without ignoring and holding at naught the ties of human affection.

At the same time the court say:

> "It is said that being a contract of assurance, the law on the subject of marine insurance is applicable to it; and therefore unless the assured had an interest in the subject matter insured, he is not entitled to his action.
>
> "This position we agree to: for otherwise it would be a mere wager policy, which we think would be contrary to the general policy of our laws, and therefore void." *Ibid*, p. 118.

Recognizing the tie of immediate consanguinity and the tie of marriage as giving an interest, the vast preponderance of authority in this country is that the beneficiary must have an interest in the life insured.

The question as to the necessity of an insurable interest has arisen in several classes of cases and the decisions have not been absolutely uniform in any one class.

1. The first class is that in which a man, for his own benefit, insures the life of another. In this case, almost all the authorities in this country agree that

the party must have an insurable interest in the life insured, or the policy is void.

In fact, in all the jurisdictions, so far as we can discover, except in those in which wager contracts are valid at common law and no statute has been enacted to the contrary, this rule has been universally upheld.

We have already referred to the case of *Trenton Mut. Life and Fire Ins. Co. v. Johnson*, 4 Zabriskie, 576. We find that this decision has been affirmed in a recent case, *Vivah vs. Supreme Lodge of Knights of Pythias*, Atlantic Law Reporter, Vol. 20, p. 36, which was decided upon the ground stated in the exception to the rule.

But the rule has been sustained in the following cases ;

Mitchell v. Union Life Ins. Co., 45 Me., 104.
Bevin v. Conn. Mut. Life Ins. Co., 23 Conn., 244.
Lewis v. Phœnix Life Ins. Co., 39 Conn., 101.
Mutual Life Ins. Co. v. Allen, 138 Mass., 24.
Ruse v. Mutual Ben. L. Ins. Co., 26 Barb., 566.
S. C., Court of Appeals, 23 N. Y., 516.
Rawles v. American Mut. L. Ins. Co., 36 Barb., 357.
S. C., Court of Appeals, 27 N. Y., 282.
Mowry v. Atlantic Mut. L. Ins. Co., 9 R. I., 346.
Corson's Appeal, (Penn.) 16 Ins. L. J., 99.
Bloomington Mut. L. & B. Asso. v. Blue, 120 Ill., 121.
Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill., 35.
Burton v. Conn. Mut. L. Ins. Co., 119 Ind. 448.
Continental Life Ins. Co. v. Volger, (Ind.) 13 Ins. L. J., 142.
Singleton v. St. Louis Mut. Ins. Co., 66 Mo., 63.
Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co., (Ala.) 16 Ins. L. J., 351.

Price v. Knights of Honor, 68 Texas, 366.
Equitable L. Ass. v. Hazelwood, 75 Texas,—;
S. C., 19 Ins. L. J., 193.
Holabird v. Atlantic M. Ins. Co., U. S. D. C., (Mo.) 2 Ins. L. J., 588.
Swick v. Home L. Ins. Co., 2 Dill., 160.
Lamont v. Grand Lodge Iowa L. of H., (Iowa circuit,) 31 Fed. R., 177.
Phœnix Mut. L. Ins. Co. v. Bailey, 13 Wall., 616.
Cammack v. Lewis, 15 Wall., 643.
Conn. Mut. L. Ins Co. v. Schaefer, 94 U. S., 457.
Warnock v. Davis, 104 U. S., 775.
Conn. Mut. L. Ins. Co. v. Luchs, 108 U. S., 498.

2. The second class is that in which the policy has been assigned; and the preponderance of authority is that the assignee must have an insurable interest in the life insured or he cannot recover upon the policy.

Those which hold the opposite treat a life policy as *property*, and therefore the subject of a *bona fide* sale, forgetting, as it seems to us, that from the moment the assignee acquires the title to the policy, he has an interest to have the insured die at once; that he pays a heavy tax yearly, simply because the insured continues to live; and that every payment he makes is a loss: if it be said that it must be presumed that in taking the assignment, this yearly tax was taken into consideration and allowance made therefor, the reply is, that at best it is a wager, that the amount of that allowance is sufficient to pay the yearly tax during the life of the insured; and that it is in principle precisely similar to original insurance, in which the gain to the party effecting the insurance must result from the premature death of the insured, and in which a loss can happen only by the insured's living beyond the expectation of the parties.

The question arose in this Court in *Insurance Co.* v. *Bailey*, 13 Wallace, 616. After referring to the nature of fire and marine policies, Judge CLIFFORD says:

> "Life insurances have sometimes been construed in the same way, but the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui qui vie* are founded in an erroneous view of the nature of the contract, that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies, that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured.
>
> "Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured at the inception of the contract, as the contract is not merely for an indemnity, as in marine and fire policies." Page 619.

While this holds that a life insurance policy is not a contract of indemnity in the narrow sense of making good a pecuniary loss capable of being exactly computed, we insist that it really holds that such a policy is one of indemnity in the broader sense which includes the death of a husband or relative as a loss, which, indeed, cannot be measured in money, but still a loss which the law recognizes as a subject of indemnity.

The decision was, moreover, that to entitle the plaintiff to recover he must show, among other things, that "the party effecting the policy had an insurable interest, such as is described, in the life of the person insured, at the inception of the contract." In other words, the plaintiff must show a pecuniary interest in the life insured, or one arising from consanguinity or affinity.

In *Cammack v. Wallace*, 15 Wall., 643, it was held that a policy taken out for $3,000 to secure a debt for $70.00, was "a sheer wagering policy," and that it made no difference that the policy was taken out in the name of the insured and by him assigned to the creditor; the ground was that the disproportion between the debt and the amount insured was so great that its procurement was a mere wager. It was further held that an agreement by the creditor to pay back $1,000 did not change the nature of the contract. The rule, that a creditor can only take a valid assignment of a policy to the extent of his debt and his disbursements, was affirmed. The reason is that any contingent interest in the policy beyond that not only makes the policy a wager, but gives the assignee an interest in the death rather than in the life of the insured.

In *Connecticut Mut. Life Ins. Co. v. Schaeffer*, 94 U. S., 457, the same question was discussed, and the views of the court are thus stated:

> "But in life insurance the loss can seldom be measured by pecuniary values. Still an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him."

In *Ætna Life Ins. Co. v. France*, 94 U. S., 561, it was held that a sister has such an insurable interest in the life of a brother, that she or he may take out a valid policy on his life for her benefit. It was also held that the assignment of a policy, when not done by way of a cover for a wager policy, is valid, and where the relationship between the parties is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation. Being between brother and sister, the "case is divested of that gambling aspect which is presented where there is nothing but a speculative interest in the death of another, without any interest in the life to counterbalance it." * * "The policy is not a wager policy. It is divested of those dangerous tendencies which render such policies contrary to good morals."

In *Page v. Burnstine*, 102 U. S., 664, the defendant claimed the whole amount of the policy under an assignment on its face absolute; but the court decided that upon the evidence, the assignment, though absolute in form, was as collateral security for a debt, and that the defendant, after re-imbursing himself to the extent of his loans, must pay the balance to the persons entitled thereto. The learned Judge, delivering the opinion, says:

> "A different construction of that instrument would place Burnstine in the position of being pecuniarily interested in the death of Page. Unless compelled to do so, we should not suppose that he had any desire or purpose to speculate upon the life of Page, or to do more than secure the repayment of the money actually loaned by him to the assured." p. 670.

In *Warnock v. Davis*, 104 U. S. 775, this court, upon a consideration of the conflicting authorities held, that a person who has procured a policy of insurance on his life cannot assign it to parties who have no insurable interest in his life.

The opinion, as it seems to us, covers the whole ground, and for convenience, we copy from it:

> "The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.
>
> "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may

be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of, or surety for, the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured, than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy.

"The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole."

* * * * * * * *

"It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was, also, lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund these sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned."

Referring to decisions in New York and elsewhere, holding the opposite, the learned Judge said:

"But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other—so far at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life."

In *Connecticut Mut. L. Ins. Co. v. Luchs,* 108 U. S., 498, it was decided that a partner has an insurable interest in the life of his co-partner, and as such an interest was not capable of valuation, a policy in such case should be held to be a valued policy, precisely as if the interest arose out of ties of relationship.

In *Insurance Company v. Armstrong,* 117 U. S., 391, the court below ruled that the insured by the form of policy which he had taken was precluded from making any assignment of it, and, therefore, excluded all evidence in relation thereto; the defence claimed that he had the power to assign, and having made one to an assignee who was a special partner of the insured, the assignee owned the policy. This court sustained the contention of the defence, holding as before that where an assignment is not made in such manner as to cover a mere speculative risk, and thus evade the law against wager policies, the assignment is valid; and that a special partner has an insurable interest in the life of the general partner, and, therefore, reversed the judgment.

The assignee of the policy in that case had been convicted of the murder of the insured, committed a short time after effecting the insurance—in fact before the second quarterly premium became due. There is little doubt that the insurance was effected by the assignee with the intention of murdering the insured, in whose life he had little, if any, actual interest.

In *Swick v. Insurance Co.*, 2 Dill., 160, Judge DILLON instructed the jury that the plaintiff must have an insurable interest in the life of the insured, and in that case the plaintiff must prove that he was a creditor of the insured, and that the policy had been assigned to him as security, or the policy would be a wager policy and therefore void.

"The law forbids such mere wager policies, and also forbids any scheme or contrivance whereby its requirements in that respect are sought to be evaded."

The decisions of this court have been uniform in support of our proposition, and therefore it is not very material to inquire what conclusions the State Courts have reached; but inasmuch as the decisions are conflicting, and in some of them the question has been discussed at length and recently, we will notice some of them in our brief.

Pennsylvania upholds the rule.

Gilbert v. Moose, 104 Penn., 74, decided in 1883.

In that case a man insured his life for the benefit of the son of his son's wife: the beneficiary sold the policy absolutely to another party who had no interest in the life of the insured. The court held that the policy was originally void for want of interest by the beneficiary: and if it were not, the assignment was void for want of interest by the assignee.

Judge Gordon, delivering the opinion of the court, said:

"But as a beneficiary merely, having no interest in the life, it seems to us very clear that he could lawfully have no interest in the policy. For if we admit the contrary, if we admit that one man may insure his life for the benefit of another, who is neither a relative nor a creditor, our whole doctrine concerning wager policies goes by the board. The very foundation of that doctrine is that no one shall have a beneficial interest of any kind in a life policy who is not presumed to be interested in the preservation of the life insured. But in the case supposed the presumption is inverted; the beneficiary is directly interested in the death of the assured. Moreover, if such a transaction were permitted, the wager could always be concealed under the mere form of the policy. Nor can we see, did the defendant's case depend on an assignment directly from Moose himself, how it would be bettered in the least. The reserved point alleges that Gilbert took the assignment for the purpose of speculation, and of this there can be no doubt, for what other purpose could it have been taken? But speculation on what? The life of Moose; and the sooner that was determined the better the speculation. If there is any difference between this and an original wager policy, I confess I cannot see it. Under the case put, Gilbert, an assignee, undertakes to pay the assessments; he pays, say for example, one of $10, and the sole and only consideration for that payment is the chance that the life may fall in before the next assessment, and that for his $10 he may get $100, or, perchance, $1,000. Between this and the bet in the case of Phillips vs. Ives, 1 Rawle, 458, on the life of Napoleon Bonaparte, we can see no material difference. Both are wagers, and both dependent on the contingency of a life."

The Court cite certain decisions against this doctrine and some authorities in its support, and conclude the opinion as follows:

"These authorities, in connection with our own, remove all hesitation concerning the rectitude of the judgment of the court below. If, however, the question were one of first impression, and to be settled on the ground of public morality and judicial policy, we could hardly fail to reach the same conclusion. So fraught with dishonesty and disaster, and so dangerous even to human life has this life insurance gambling become, that its toleration in a court of justice ought not for one moment to be thought of."

In Indiana, the earlier cases, at least, were to the same effect.

Insurance Co. v. Hazzard, 41 Ind., 116.

In this case, a person took out a policy on his own life and for $20.00 assigned it to the plaintiff.

The court held that a policy issued upon the life of another, assigned to a person having no insurable interest in that life, is at common law absolutely void, as contrary to public policy.

The New York cases, holding that if the policy is valid in its exception, it may be assigned to any one, whether he have any interest in the life of the assured or not, are referred to and held not to be the true doctrine on the subject.

This case was cited and approved in *Ins. Co. v. Sefton,* 53 Ind., 389, the court remarking that subsequent reflection had confirmed them in the correctness of their conclusion in that case.

Also in *Association v. Houghton,* 103 Ind., 286.

These decisions have not been expressly overuled, but in *Amick v. Butler* (1887,) 111 Ind., 578, 12 Nor. E. Law Rep., 518, are expressions which appear to be in conflict with them. This could not have been so understood, for both cases are cited with approval. One expression is that it has never been seriously questioned but that a person holding an insurance policy, valid at its inception, may in good faith, assign his interest in it as in any other *chose in action.* The limitation follows, that the transaction must be "*bona fide,* and not a mere cover for obtaining wagering or merely speculative insurance, and a device to evade the law." We submit that the actual intention of the parties is not an essential element in the question. If a policy *is* a wager policy, it makes no difference whether the parties so intended it or not. If a man holding a policy sells it for full value to one having no interest in his life, and both parties are acting entire good faith, yet the contract is a wager, and therefore the parties are not allowed to make it. It seems to us that the attempt to make the validity of the contract depend upon the intentions of the parties is the fatal defect in the class of cases of which *Amick v. Butler* is the type. It might as well be said that the validity of any other contract, which the law holds in and of itself to be a wager depends upon the intention of the parties making it. In other words, in making these decisions, the courts forget that the very fact, that one takes an interest in a policy upon a life in which he has no interest, necessarily makes the transaction a wager.

The case of *Milner v. Bowman*, 21 N. E. Rep., 1094, is another case of the same character; and *Amick v. Butler* is cited and relied upon.

In a recent Alabama case, *Alabama G. L. Ins. Co. v. Mobile M. Ins. Co.*, 16 Ins. Law Journal, 351 (1887,) it was held that an assignee of a life policy must prove an interest in the life insured or he cannot recover.

Such is the rule in Texas. *Price v. Knights of Honor*, 16 Ins. Law Jour., 846 (1887); *Scanfield v. Turner*, 19 Do., 238 (1889); *Cawthorn v. Perry*, 19 Do., 523 (1889.)

In *Basye v. Adams*, 81 Kentucky, 368, the court say:

"The precise question before us has not heretofore been presented to or decided by this court. Nor does there exist in this State any statutory provision on the subject. But, in our opinion, adhering to well-known and recognized principles, there need be but little difficulty in determining it. Public policy requires that in all cases it should be essential to the validity of a policy of insurance, obtained by one person for his own benefit upon the life of another, that the party so obtaining the policy should have an insurable interest in the life of that other.

* * * * * *

"Counsel for appellant have cited authorities sustaining the opposite doctrine as respects the assignment of policies of life insurance. But we are unable to see why the rule recognized by all the authorities as applicable to, and which renders invalid, because against public policy, policies of life insurance taken for the benefit of a party having no insurable interest in the life of the person in whose name it is issued, should not be also applied to an assignment of a policy where the assignee has no such insurable interest."

* * * * * *

"It is not a sufficient answer to say that the policy was valid when issued; for, if a person 'may purchase a policy on the life of another, in whose life he has no interest, as a mere speculation, the door is open to the same practice of gambling, and the same temptation is held out to the purchaser of the policy to bring about the event insured against as if the policy had been issued directly. It is, in fact, an attempt to do indirectly what the law will not permit to be done directly."

In *Ins. Co. v. Sturgis*, 18 Kansas, 93, one Haynes insured his life and afterwards assigned the policy to Sturgis, who brought suit upon it, and the court after stating the facts say (*inter alia*):

"Can he recover? We think not. Sturgis never had any interest in the life of Haynes, but on the contrary, his whole interest, after said assignment was in the death of Haynes. Each year that Haynes lived Sturgis was compelled to pay out $150.32 without the slightest hope of ever receiving anything in return therefor. He was compelled to pay that amount in order to preserve the life of his insurance policy, but any payment that he could make would never increase the amount of the benefit which he expected finally to receive. The policy in case of death was worth just as much on the day of the assignment as it ever could be afterward. If Haynes had died on the very day on which said assignment was made, the holder of the policy would have been entitled to receive just $2000, and no payment of premiums for any length of time afterward could ever increase that amount. Nor was Haynes bound to ever refund anything to Sturgis. Nothing that Haynes might have earned or owned or received could ever possibly go to Sturgis. Sturgis was not dependent upon Haynes for any support, nor was he his heir or devisee or legatee. Nor was there even the slightest tie of kindred or relationship or even of friendship binding them together and making it desirable to Sturgis for Haynes to live. Sturgis in fact had no interest in Haynes except that Haynes should die, and as soon as that event should take place, Sturgis expected to receive from the insurance company the sum of $2000, and of course, all his expenditures on said policy and on Haynes' life would then cease. Hence it will be perceived that Sturgis after the assignment had a vast interest in procuring the death of Haynes but had no interest whatever in preserving his life. Haynes' life cost Sturgis $150,32 each year without the slightest benefit in return, while

Haynes' death would be worth to Sturgis $2000, without the slightest loss or inconvenience whatever. Now can such a state of things be tolerated by the laws of any civilized country?"

* * * * * *

"Where such contracts are issued with beneficial and modified circumstances (as many insurance contracts are supposed to be) making them beneficial, they are generally upheld, notwithstanding their wagering characteristics. But where they are not issued with any such beneficent or such modifying circumstances, but are left wholly in their own naked deformity as merely wagering contracts, they fall under the same merited interdiction as other wagering contracts. And of all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic, and the most persistent condemnation. This is just what the present insurance policy was in the hands of Sturgis, a mere wagering contract upon the life of Haynes. And if the assignment from Haynes to Sturgis were to be upheld as valid under the law, it would be virtually saying that the law authorizes mere wagering speculations, mere mercenary traffic concerning human life, and it would be opening the door wide and inviting to enter the most shocking of all human crimes. If any person should desire to know what men may do where they are strongly interested in procuring the death of another person for the purpose of obtaining benefit of the life insurance policy, he may read the case of the *State vs. Winner*, 17 Kansas, 298, 300."

In Massachusetts, New York and Rhode Island the doctrine prevails that a policy, valid in its inception, may be assigned to one having no interest in the life insured, and be valid in his hands.

In Massachusetts, in *Stevens v. Warren*, 101 Mass., 564, however, the court held to the opposite doctrine, saying:

> "In the second place, it is contrary to the general policy of the law respecting insurance, in that it may lead to gambling or speculating contracts upon the chances of human life.
>
> "The general rule, recognized by the courts, has been that no one can have an insurance upon the life of another, unless he has an interest in that life."

Two prior cases are cited. Then the court say, in substance, that the assignee had no such interest and could not legally have procured insurance upon the life of the insured; and that as he claimed the absolute title by purchase, "the rule of law against gambling policies would be completely evaded, if the courts were to give such transfers the effect of equitable assignments, to be sustained and enforced against the representatives of the assured."

In *Pierce v. Ins. Co.*, 138 Mass, 151, it was merely held that a policy may be assigned as collateral security for a debt, and the creditor was allowed, upon proof that his debt exceeded the amount of the policy, to maintain an action in the name of the insured.

But in *Ins. Co. v. Allen*, 138 Mass., 24, the question was fully discussed, and the conclusion reached that an assignment of a policy of life insurance, valid in its inception, is valid unless made in bad faith and intended as a gambling transaction.

The decisions of this court are cited, and their force denied by the suggestion that the facts were such that the transactions might well be held to be in bad faith and really intended to be gambling transactions, or mere speculations.

We submit that the court lost sight of the fact that if a transaction *is* gambling, or *is* " mere speculation," it matters not whether it is so " intended " or not.

If a man, having no interest in the life insured, for a specified consideration, absolutely purchases and holds, as a business transaction, a policy upon the life of another, what *is* it, or *can* it be, but a speculation ? The seller wants the money and so wishes to sell his policy; the buyer buys because he wants to make money and believes he can do so by buying the policy : if this is not a mere speculation, what is it ?

If it is a " mere speculation," it is admitted that the transaction comes within the principle which denounces wagering contracts.

The same remarks apply to the decisions in New York and Rhode Island. But it should be remarked that in the case of *Ruse v. M. B. Life Ins. Co.*, 23 N.Y., 516, it is said that a " policy obtained by a party who has no interest in the subject of insurance, is a mere wager policy," and " policies without interest upon lives are more pernicious and dangerous than any other class of wager policies, because temptations to tamper with life are more mischievous than incitement to mere pecuniary frauds."

In Connecticut, in *Fitzgerald v. Ins. Co.*, 17 Ins. L. J., 351, it was held (two of the five Judges dissenting) that an assignment of a policy, made in good faith, to one not having any interest in the life insured, made it a valid policy in the hands of the assignee.

"We think the weight of argument is in favor of permitting the owner of a contract of life insurance which has the sanction of the law, to sell it upon the most advantageous terms, having the world for a market, provided it is an honest exchange of property and not a mere cover for a wagering transaction."

In *Bursinger v. the Bank*, 16 Ins. L. J., 265, the Supreme Court of Wisconsin held that the owner of a valid policy may lawfully assign it in good faith to any person, relying upon the New York, Massachusetts and Rhode Island authorities, declaring that the decision of this court in *Warnock v. Davis* does not conflict with those authorities, although the learned Judge, who drew the opinion in the latter case, expressly stated that those authorities were in conflict with the position which he maintained!

The court, however, found another ground upon which its decision of the case could be upheld, and its opinion upon this question was not necessarily involved.

In Mississippi, the court held squarely that the owner of a valid policy may sell it as he may any other property. Nothing is said of good faith. The court say that the objection that such a sale would be tainted with the vice of gambling is, as a matter of law, "extremely fanciful and unsatisfactory."

Murphy v. Red, 16 Law Ins. J. 481.

Finally, it seems to us, that the correct rule and reason therefor are stated by May in his work on Insurance (Sec. 398):

> "All the objections that exist against issuing a policy to one upon the life of another in whose life the former has no insurable interest exist against his holding such policy by mere purchase and assignment from another. In either case the holder of such policy is interested in the death rather than in the life of the insured. The policy of the law forbids such speculations based on the continuance of human life. It will not uphold a practice which incites danger to life, and it substantially declares that no one shall have any claim under a policy upon the life of another in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer or whether he acquires the policy by purchase and assignment from another. If he may purchase a policy on the life of another in whose life he has no interest, as a mere speculation, the door is open to the same practice of gambling and the same temptation is held out to the purchaser of the policy to bring about the event insured against as if the policy had been issued directly. It is, in fact, an attempt to do indirectly what the law will not permit to be done directly."

Another author, who denies that upon fundamental principles of life insurance, an interest in the life insured is ever necessary, adds:

> "But, assuming the existence of such doctrine, it certainly should be consistently applied. If, then, it is contrary to public policy, that one person should have an expectation of a benefit conditioned on the happening of the death of another, it surely seems immaterial whether the person having such expectation derived it from a contract made by him directly with

the insurer, or by transfer from the person who made such contract with the insurer. Hence (making the assumption stated above), it must be regarded as the true doctrine, that an assignment of the interest in a contract of insurance to one having no insurable interest in the life insured, is invalid as contrary to public policy. And this is so, whether the assignment is made by the person insured, who is also the beneficiary, or by a beneficiary who is not also the person insured, and whether or not the assignment was made in good faith. And the burden is on the assignee seeking to enforce the contract, to prove the existence of such interest.

"But the doctrine of the necessity of an insurable interest to support such assignment, has been so frequently dissented from, that it can scarcely be said to be sustained by the weight of authority. The alleged ground of the contrary doctrine, that an assignment to one having no insurable interest, is valid, seems to be that the contract of insurance, being governed by the rules applicable to contracts generally, is therefore assignable like contracts generally, irrespective of the question of such interest. But this statement is unsatisfactory, as it entirely ignores and fails to meet the objection stated above."

Cooke on Life Insurance, Sec. 73.

In a note he cites the cases against the "doctrine" of which he speaks, but not those supporting it. We think that if he had carefully examined all the cases, he would have been satisfied that the weight of authority, as well as principle, sustains his position as above given.

3. The next class of cases is that in which a person takes out a policy upon his own life for the benefit of some one who has no interest in the life insured. This

class of cases arises under three different state of facts:

(a) When the beneficiary is a mere trustee, holding the fund for persons who have an interest in the life insured.

In this case there can be no question whatever: the trustee has no interest the one way or the other; the *cestuis que trust* are the *real* parties, and if they have an insurable interest, the case comes within the general rule.

(b) When a policy is taken out by one person, and another person, who has no interest in the life insured is named in the policy as beneficiary, and *who pays the premiums.*

(c) When a policy taken out and the premiums thereon paid by one person, is made payable to a beneficiary who has no interest in the life insured.

As some of the decisions make the distinction between these two classes a vital one, and as other decisions do not recognize the distinction at all, it will be more convenient to discuss them together.

It would seem that all courts which hold that one person cannot, for his own benefit, insure the life of another in whom he has no interest, must also hold that a policy taken out by one man for the benefit of another who has no interest in his life, and who pays for and maintains the policy, is equally invalid.

To all legal intents and purposes, the two transactions are precisely alike, except in *form* merely; and who ever claimed that an illegal contract can be made a legal one by merely changing its form?

A fortiori courts, which hold that a policy cannot be legally assigned to a person having no interest in the life insured, must hold that giving such a party the title to the policy originally, puts him in no better position than he would have held if he took it by assignment.

In the cases already cited this proposition is fully recognized and supported. In the language of Judge DILLON: "The law forbids such mere wager policies, and also forbids any scheme or contrivance whereby its requirements in that respect are sought to be evaded." *Ante*, p. 23.

It seems to us that if the insured pays the premiums, the same reason exists for holding the policy invalid; the beneficiary is still interested not in the *life* of the insured, but in his *death*.

The difference in the two classes of cases is not one of *character* but of *degree*. The only difference is that in the one case the beneficiary has the increased interest in the death of the insured growing out of the payment of the premiums, and in the other he has not; but in both he has an interest in the insured's early death. The law will not allow one man to speculate upon the life of another; will it allow a man to speculate upon his own life for the benefit of one in whom he has no interest and who has no interest in him? Is it not true, that the moment we depart from the rule, that to sustain a policy of insurance, the party to be benefited must have an interest in the life of the insured, either pecuniary or from circumstances that naturally make the beneficiary desire the continued life of the insured, we enter the domain of speculation and gambling?

In other words, is not indemnity, in the broad sense above suggested, really the fundamental principle of the insurance of life, as well as of property?

In some of the cases, the language of the court seems to indicate that the beneficiary in such case is a mere trustee for others, that is, those to whom the fund would belong as heirs of the insured. Indeed, we are inclined to think that the doctrine that such a policy is valid originated in this idea, and that as subsequent decisions were made, courts lost sight of this idea and held, upon the authority of the previous cases, that such a policy, making the beneficiary the absolute owner of the fund, is valid equally as if it had made him only a trustee.

In considering the decisions, it should be remarked, that in some states the decision of the question has been affected by statutory law.

In *Lord v. Dall*, 12 Mass., 115, the insured took out a policy on his own life in favor of his sister and gave his note for the premium. The court held, in effect, that in order to support the policy the beneficiary must have an interest in the life insured, but that the relation of brother and sister gave her such an interest.

In *Forbes v. Insurance Co.*, 15 Gray, 249, the defence objected that the plaintiff had proved no insurable interest insured, but the presiding judge ruled that that defence was not open under the pleadings, and the full court sustained the ruling.

But the court discuss the question, saying:

> "In this case, the policy was procured by Thomas T. Smith upon his own life, and the first payment upon it was made by him. It was made payable to the plaintiff, the husband of his sister, and the subsequent payments were made by the plaintiff as his agent; but the promise of the company is to and with Smith. The policy appears to have been really, if not nominally, for the benefit of Smith, and *the interest of the plaintiff to be simply that of a trustee.* Under such circumstances, we think no question could have arisen as to the sufficiency of the interest."

Holding that the plaintiff was a mere trustee, the court merely decided that as the *cestui que trust* had sufficient interest in the life, it was not material that the trustee should have an interest—a proposition which no one denies, and which is no authority for the doctrine, which the case has been frequently cited to sustain.

Campbell v. Ins. Co., 98 Mass., 381, was decided upon the same ground, the court saying:

> "The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by agreement of the parties to receive the proceeds of the policy upon the death of the assured."

The next case in Massachusetts was *Stevens v. Warren*, 101, Mass. 564, which we have already cited and from which we have already quoted; See *ante*, p. 30.

After giving the general rule, "that no one can have an insurance upon the life of another, unless he has an interest in the countinuance of that life," the court says:

> "When the contract between the assured and the insurer is 'expressed to be for the benefit of' another, or is payable to another than the representatives of the assured, it may be sustained accordingly. Gen. Sts., c. 58, § 62; *Campbell v. New England Ins. Co.* 98 Mass., 381."

Under the statute cited (which was in force when the policy was taken out in the case cited) the decision could not have been otherwise. If a Legislature chooses to make gambling contracts legal, the Judiciary can do no otherwise than declare the law as the Legislature has enacted it.

That statute, so far as it touches this question, provides that—

> "A policy of insurance on the life of any person, expressed to be for the benefit of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors."

* * * * * *

> "When a policy is effected by any person on his own life or on the life of another, expressed to be for the benefit of such other or his representatives, or a third person, the person for whose benefit it was made

shall be entitled thereto against the creditors and representatives of the person effecting the same."

* * * * * *

That statute is still in force, and all the subsequent decisions are controlled by it. But the Massachusetts cases are still cited as authority without reference to the statute.

In New York, the cases agree that one may insure his own life for the benefit of one who has no interest in it. But whenever the question has arisen, so far as we can find, it has been held that in such case, if the policy was procured or paid for by such beneficiary, it is a wager policy and void.

Valton v. Assurance Soc., 20 N. Y., 32.
Rawls v. Ins. Co., 27 New York, 282.
Mallory v. Ins. Co., 47 N. Y., 52.
Olmstead v. Keyes, 85 N. Y., 593.

Much is said in some of these cases in relation to *bona fides*; but the result of them is, that a man cannot insure the life of another, in whose life he has no interest, for his own benefit; that a man may insure his own life for the benefit of another not interested in his life; but that the courts will not uphold a contract which in form is the insurance by a man, of his own life for the benefit of another having no interest in it, but which in fact is the insurance of the life by the other for his own benefit, and whether a contract belongs to one class or the other depends upon who pays the premium.

Lemon v. Ins. Co., 38 Conn., 294, has been cited as authority upon this question; but the decision was that the beneficiary, who was the affianced of the insured, had an insurable interest in his life.

In Indiana, in *Ins. &c. Co. v. Baum*, 29 Ind , 236, the court hold that a policy taken out, and maintained by the insured is valid in the hands of a beneficiary having no interest in his life. The same doctrine was affirmed by the same court in later cases:

Continental Life Ins. Co. v. Volger, 89 Ind., 572.
Elkhart &c. Assoc. v. Houghton, 15 Ins. Law Jour., 97.
Milner v. Bowman, 18 Ins. L. Jour., 708.
Burton v. Ins Co., 119 Ind., 448.

The case of *Amick v. Butler*, 12 Northeastern Reporter, 518 (already cited), sustains the same doctrine, but makes the distinction between that class of cases and the one in which the beneficiary actually procured the insurance and paid the premiums, and holds this class of policies void: the court say:

> "Where the person whose life is insured is the real contracting party, and continues to pay the premiums, it is of no consequence that the beneficiary, or appointee in the policy, has no insurable interest in the life of the insured. In such a case the policy is valid in any event; and if the beneficiary or assignee be a creditor, and holds the policy as a security merely, he will be a trustee for the excess, as is any other creditor who holds securities for a debt. In case, however, the party insured is only nominally the contracting party, while the beneficiary named in the policy or the assignee has in reality procured the insurance and paid the premiums, then, in order that the transaction may be taken out of the category of wagering contracts, the beneficiary must have had an insurable interest of

a pecuniary character, or of that nature, either present or prospective, at the time the policy had its inception."

In *Bloomington, &c. Asso. v Blue,* 120 Ill., 121, the court held that a policy taken out by the beneficiary on the life of another in whom he has no interest is void: but when the insured takes out a policy and pays the premium, making it payable to another, the policy is valid.

In *Insurance Co. v. Robertshaw,* 26 Penn., 189, it was held that—

> "It is clear that a man may *bona fide* insure his own life and direct the insurance money, in case of loss, to be paid to another as trustee."

The court found that in that case the beneficiary was trustee and sustained the policy.

In *Gilbert v. Moore,* 13 Ins. Law Jour., 297 (already cited) the insured took out a policy on which he paid the premiums for the benefit of a son of his son's wife, who had no interest in the life insured. The court (Pennsylvania) held that the beneficiary could not recover. In *Scott v. Dickson,* 108 Penn., 6, the same court say that Gilbert v. Moore was an "admitted case of a wagering policy."

In *M. B. Asso. v. Hoyt,* 10 Ins. Law Jour., 626, the Supreme Court of Michigan held that—

> "A contract by a benefit society to pay money upon the death of one of its members to one, who it is clearly apparent, has no interest in the life insured, is contrary to public policy, and will not be enforced.
>
> "Such contracts are so clearly contrary to public

policy that they cannot be upheld, and must be declared absolutely void."

In the case it appeared that the insured represented that the beneficiary was not related to him; so that the court held that the defendant stood in no position to interpose the defence, but that it must be considered and sustained as that of the public.

In Texas, a beneficiary having no interest in the life insured, although the insured took out the policy and paid the premiums, cannot maintain an action on the policy, except as *trustee* and to collect the amount for those entitled to receive it, viz: the heirs or devisees of the insured.

Price v. Supreme Lodge, &c., 68 Tex., 361.
Equitable, &c., Society v. Hazlewood, 75 Tex., 19.
Knights, &c., v. Burke, 20 Ins. Law Journal, 1051.

We find no cases decided by this court in which these two questions, or either of them, were directly involved; but it seems to us that the reasoning of the court in the cases we have cited in relation to wager policies and the assignment of policies, applies to cases in which a beneficiary, having no interest in the life insured, is the absolute owner, in effect, of the policy; or (which is the same thing) the absolute owner of the amount to be paid under it.

The result of the cases of the State courts is: that when in such case the beneficiary pays the premiums, the policy is void; but a majority of them hold that if the insured pays the premiums, the policy will be upheld, although the beneficiary has no insurable interest in the life. The supposed preponderance of authority in favor of this latter view has been followed at the Circuit in some cases, but the remark has been made by a Judge presiding, that if it were an original question, he should be disposed to say that a policy taken out by one person for the benefit of another could no more be supported without evidence of legal interest in the beneficiary, than a policy assigned to one having no interest in the life.

In view of the fact that the decisions are conflicting, it would seem that this court should decide the case on principle, even though their decision should be in conflict with a majority of the cases decided elsewhere.

But in this case another consideration may intervene.

In the application it is provided—

"That the entire contract contained in the said policy and this application taken together, shall be construed and interpreted as a whole and in each of its parts and obligations according to the charter of said company and the laws of the State of Maine, the place of contract being expressly agreed to be the office of the said Company, in the City of Portland, in the State of Maine."

But the application also provides—

"That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said Company and the first premium thereon actually paid during the continuance of the life proposed for insurance, in the same condition of health as described in the application."

The first premium was paid in California and the policy delivered there.

O'Brion's testimony, Case p. 35.

The question whether this was a Maine contract or a California contract may become material only because in the latter state, statutes have been enacted in relation to this question of insurable interest. There is no such statute in Maine, and those in California, if material at all, are only material in so far as they change the law as judicially settled elsewhere.

For convenience we quote the California statutes:

CIVIL CODE OF CALIFORNIA.

"Sect. 2534. All kinds of insurance are subject to the provisions of this Chapter."

"Sect. 2551. The sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void."

"Sect. 2552. An interest insured must exist when the insurance takes effect, and when the loss occurs, but need not exist in the meantime."

"Sect. 2553. Except in the cases specified in the next four sections, and in the cases of life, accident, and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent, until the interest in the thing and the interest in the insurance are vested in the same person."

"Sect. 2558. Every stipulation in a policy of insurance for the payment of loss, whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest; and every policy executed by way of gaming or wager is void."

"Sect. 2763. Every person has an insurable interest in the life and health;

"1. Of himself;

"2. Of any person on whom he depends wholly or in part for education or support:

"3. Of any person under a legal obligation to him for the payment of money, or respecting property or services, of which death or illness might delay or prevent the performance; and,

"4. Of any person upon whose life any estate or interest vested in him depends."

"Sect. 2764. A policy of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered."

It will be perceived that the statute recognizes the principles,

> That the sole object of insurance of all kinds is indemnity.
>
> That the beneficiary in a policy must have an insurable interest in the life insured, both at the inception of the policy and at the time the policy becomes a claim.

That this last provision relates to life policies is evident from Sections 2534 and 2553 taken in connection with Section 2552.

Section 2558 in effect provides—

> That any stipulation in a policy providing that, whether the person insured has or has not an interest in the subject of insurance, the loss shall be paid, is void.
>
> That a stipulation in a policy that the policy itself shall be proof of an insurable interest is void.

And that every policy executed by way of gaming or wager is void.

If a stipulation in a policy, that it shall be proof of the necessary insurable interest is void, will any one say that a policy, which has no such stipulation, is evidence of such interest?

Section 2764 does not apply to this case; it relates to the transfer of an existing valid policy of insurance by assignment, will, or succession.

Under the California statute, a man can take out a policy on his own life only in favor of himself; one upon whom he in some measure depends for support; a creditor; or one upon whose life an estate vested in him depends; by the enumeration of these cases, the statute excludes all others.

When an insurable interest is necessary, the burden is on the party alleging it, to aver it in his pleadings and prove it by evidence.

This is so plainly correct, that it would be a waste of time to discuss it; we, therefore, content ourselves by citing some of the authorities.

Ins. Co. v. Volger, 89 Ind., 572 (on demurrer to complaint.)
Burton v. Life Ins. Co., 119 Ind., 448 (on demurrer.)
Life Ins. Co. v. Hogan, 80 Ill., 35.
Singleton v. Ins. Co., (Missouri) 576, 66 Mo., 63
Elkhart, &c. Asso. v. Houghton, 103 Ind., 286.
Freeman v. Ins. Co., 38 Barb., 247.
Ruse v. Ins. Co., 23 N. Y., 516.
Bloomington, &c. Asso. v. Blue, 120 Ill., 121.

Holabird v. Ins. Co., (U. C. C., Missouri D.) 2 Law Ins. Jour., 588.
Mowry v. Ins. Co., 9 R. I., 346.
Fowler v. Indemnity Co., 26 N. Y., 422.
Life Ins Co. v. Mut. Ins. Co., 16 Law Ins. J., 351.
Swick v. Ins. Co., 2 Dillon, 160.
Ins. Co. v. Bailey, 13 Wall., 616.

In this case, when the plaintiff stopped he had not proved the execution of the application, and so had not proved the contract.

But if this ground is not tenable the result is the same, because he had not proved an insurable interest.

According to Thomas O'Brien's testimony, (Case, p. 35) he was the agent of Crotty. the plaintiff in this transaction; he says: "Mr. Hatch" [who was the Company's agent] "brought the policy to me in Mr. Swift's office." "He" [referring to Hatch] "brought it to me and I paid him the money." This refers to the first premium. "I paid the money on both the receipts" [that is, the first and second premiums] "at Mr. Crotty's request; he left the money with me." He paid them out of Crotty's money, and paid them to the defendant's agent.

The policy did not become a contract until the first premium was paid and the policy delivered, and then it did. See Application attached to Case, p. 2. Crotty's agent paid that first premium with Crotty's money and took the policy for him, and thus made it a valid contract, if it ever was one. Thus Crotty took out the policy on Michael O'Brien's life and paid the first premium, and the question whether he can recover upon the policy depends upon whether he had an insurable interest in O'Brien's life or not.

He avers in his complaint that he was a creditor of O'Brien's, both at the inception of the policy and also at the time of O'Brien's death, and therefore had an insurable interest in O'Brien's life.

If he was not a creditor at the inception of the risk, according to the overwhelming preponderance of authority, as well as the California statute, the policy which he took out on the life of O'Brien was absolutely void.

When he rested, he had offered no proof whatever that he was a creditor at the time when he took out the policy, nor at the time of O'Brien's death.

So that the granting of the defendant's motion by the presiding Judge on the second ground was right and cannot be ground for reversal of the judgment.

III. The Judge stated, however, that if the plaintiff desired to put in evidence on these two points, he would overrule the motion and re-open the case to receive such evidence. Plaintiff's counsel asked and were allowed time to determine what they would do. They concluded to ask the court to re-open the case for the purpose of putting in evidence of the genuineness of the signature alone. The Judge declined to re-open the case for that purpose; a long discussion ensued, but the Judge declined to re-open the case, ex cept for the purpose of receiving evidence on both points, and the following order was entered:

> "The motion to instruct the jury to find for the defendant having been submitted, said motion is granted, unless plaintiff should choose to put in evidence upon the point of the indebtedness of O'Brien to plaintiff, Crotty, and also upon the execution of the application of Michael O'Brien. Thereupon counsel for plaintiff, indicating that he desired to put in proof upon those points, the motion is overruled.
>
> Record, pp. 38 to 43.

To this order, no exception was taken, and the plaintiff proceeded to put in testimony, first saying that he understood if he put in some evidence of indebtedness, the court would not undertake to direct the nature and extent of it.

The plaintiff then put in oral testimony to the genuineness of Michael O'Brien's signature and again rested. There can be no pretence that in the oral testimony, there was the slightest evidence of any indebtedness of O'Brien to Crotty. Thereupon, the condition upon which the case was re-opened, not having been complied with, the Judge, upon motion, ordered the new testimony to be stricken from the record.

To this the plaintiff excepted, and this is his third specification of error.

That it was within the discretion of the court to re-open the case or not, is not denied.

It would seem to be a matter of course, that if a case is re-opened on condition, the condition must be complied with, or the court will put the case in the same *status* in which it was before it was re-opened; and that the court will not allow its orders to be evaded in any such manner.

We do not forget that the counsel claimed that by proving the genuineness of O'Brien's signature to the application, they had also put in evidence that O'Brien was indebted to Crotty, but beyond question, if counsel had stated to the court in advance that they proposed to prove the signature of Michael O'Brien to the application, and then claim that by proving the application to be genuine they had offered evidence that Crotty was a creditor of O'Brien, the case would not have been re-opened.

If this method of obtaining the re-opening of a case can be sustained, it must be upon the ground that the requirement of the judge, that they must prove two points, was so palpably unreasonable, and their necessity to prove one of the points so urgent, as to authorize indirection in the conduct of the cause. This is a delicate question affecting the relations between court and counsel, and we prefer to leave it to the court without further discussion.

Of course if the whole matter was within the discretion of the presiding Judge, the judgment cannot be reversed upon the third specification of error.

IV. But if the testimony stricken out of the record, is to be considered as in the case when the testimony was closed, the subsequent rulings and directions of the presiding Judge were correct. This proposition covers the fourth, fifth, sixth and seventh exceptions of the plaintiff and his corresponding specifications of errors.

Considering this testimony as in the case, the genuiness of the application, is sufficiently proved; but there is no evidence that would have justified the jury in finding that Crotty had such an insurable interest in the life of O'Brien, as would enable him to maintain the action.

The new evidence establishes more strongly that Crotty took out the policy for his own benefit and paid the premiums. His agent took delivery of the policy and paid the first premium, thereby making the policy a contract; it now appears (page 43) that this same agent took the policy with him and presented it, when he paid the second premium six months after its date; it had already appeared that Crotty delivered the policy to his counsel when it became necessary to make the proofs of death (page 33), O'Brien having died within less than eight months after the date of the policy. Thus Crotty took out the policy, paid the premiums on it, kept it in his possession, made the proofs of death and commenced this action upon it. O'Brien's only connection with it was (so far as the proof goes) that he signed the application at the office and *at the desk of Crotty's agent:* that he and Crotty's agent then went together to the Doctor's office where O'Brien signed it again. That this case comes within the decisions that one, who takes out a policy of insurance upon another's life, must show an insurable interest in the life insured, is, therefore, absolutely certain.

When the complaint was made the plaintiff's counsel recognized this, and alleged in proper form that at the time the insurance was effected and at the time of the death of O'Brien, he was a creditor of O'Brien and, therefore, had an insurable interest in his life.

This allegation is denied in due form and the issue raised between the parties.

It would seem that no argument is necessary to show that evidence must be adduced to establish a necessary averment in the complaint when that averment is expressly denied in the pleadings.

It is claimed that the policy and application and the proofs of death are *prima facie* evidence that Crotty was a creditor of O'Brien, and sufficient ground to sustain a verdict for the plaintiff.

In the body of the policy, it is provided that its amount shall be payable to O'Brien on January 15, 1941, or if he was not then living, in ninety days after proof, &c., "to Michael Crotty, his creditor, if living." In the application, in answer to the question whether the beneficiary had an interest in the life to the amount applied for, and if yes, how it arises, the answer is "Yes, Creditor."

In the proofs of death, in reply to the question, "In what capacity, by what title do you make the claim," Crotty answers, "As creditor and beneficiary named in the policy." And in answer to the requirement that if he claims under an assignment to give the particulars, he answers, "The claim by me as creditor and beneficiary named in the policy."

These are all the mention of this matter in the papers put in evidence, and all that it is claimed, or can be claimed, was in the case to support the plaintiff's contention that he had offered proof of an insurable interest.

So far as the proofs of death are concerned, their sole office is to state the *claim* of the plaintiff. In both cases, in these proofs, Crotty *claims* as creditor and beneficiary.

In the decided cases, the vast preponderance of decisions is that they are receivable as evidence only to show that they *were made* in compliance with the provisions of the policy. It is true, that in some cases it has been held that if they are admitted without objection, their contents become evidence of all the allegations which they contain. So much of them as is signed by the party, of course, stand upon the same ground as other admissions by him.

Newton vs. Insurance Co., 22 Wallace 32.

But as they are admissible only for a well known purpose, that is, to prove that they were seasonably made, the conclusive presumption of law is, that they are admitted for that sole purpose and that a failure to object to them is not a waiver of the rights of the parties.

The observations of the court in *Hiles vs. Ins. Co.*

(Wisconsin) 15 Law Ins. J., 443, 445, so clearly state the rule and the reasons against the opposite doctrine that we quote them.

"We will not so hold, as a question of practice, in this case, because we choose to decide the main question involved, viz: Whether, when certain evidence is offered which is competent, relevant, and material, only to prove a certain specific fact, and incompetent, irrelevant, and immaterial as proof of anything else, and it is not objected to as proof of anything else, such evidence shall thereafter be proof of all facts on the merits of the cause, within the subject-matter, or having reference to the subject-matter, of such evidence. As for instance, as in this case, or when the statute requires that before a party injured by a defective highway can bring his action against the town he shall make out and serve on the supervisors a written statement of the defect of the highway and its location, the manner of his injury thereby, and the particulars thereof. and the damages suffered; and on the trial, in order to show a compliance with this condition precedent. he introduces a copy of such statement without objection. and follows it with proof of its due service on the supervisors. and then rests his case, shall such copy be accepted as due proof of his injury and damages. and the defect of the highway, and all other facts stated in it as its subject-matter? The policy of our modern practice is that mistake, inadvertence. surprise. and excusable neglect shall work no substantial injury to a party. and that all technicalities, mean advantages. and tricks of practice shall be discouraged and frowned upon by the courts. I do not believe that there is one lawyer in a thousand, of long experience and large practice. who would even suspect that when such evidence is offered. and he was not captious enough to object to it. or object that it shou'd not be received to prove a fact for which it was irrelevant, immaterial, or incompetent. or that it should only be received for the specific purpose for which it was only competent, that it would be claimed that such evidence was sufficient to prove any other and all other facts relating to it on the merits of the case. That such unexpected and unreasonable advantage should be gained by the other party and lost by the party so failing to object, I am quite sure, would be a surprise to the bar generally, and to most courts. The rule is illogical, unreasonable, and fraught with mischief, and it is to be regretted that it has ever met with judicial sanction."

The court further say—

"The true limitation of the rule is suggested in the above mentioned note, and that is, when any matter of evidence is offered, and no objection, or a mere general objection, is made, it is to be evidence, if received, for all purposes for which it is relevant and competent, but no further."

The true rule seems to us to be stated in *Ins. Co. v. Sheppard* (Georgia) 12 South Eastern Rep., 18. In supporting an action, beyond clearing the way for it, the preliminary proof has no efficiency whatever. Indeed, the general and better opinion seems to be, that where preliminary proofs are in writing, the only concern of the jury with them is to pass on their authenticity and identify them as the proofs submitted to the Company. The question of their sufficiency is for the court.

If proofs of loss were admitted to show that proofs had been made in compliance with the policy, they were competent. If offered and read to the jury as *prima facie* evidence of plaintiff's claim, their admission would have been an error.

Accident Asso. v. Smith, 126 Penn. State, 317. See also *Ins. Co. v. Sennett*, 41 Penn. State, 161, and *Ins. Co. v. Schreffler*, 42 Penn. State, 188.

In *Browne v. Ins. Co.*, (Missouri) 8 Ins. Law J., 431, the policy provided that if the plaintiff in his proofs of loss fraudulently overvalued the property destroyed, he could not recover; the defendant introduced the proofs to lay a foundation to show that he did fraudulently overvalue; the defendants requested the court to instruct the jury that they were to consider these proofs as evidence only that they were so made and delivered to the defendants, and not as evidence proving or tending to prove the amount of the plaintiff's loss. The presiding Judge declined to give the instruction, and, for that reason, the full court reversed the judgment. The court cite *Howard v. Ins. Co.*, 4 Denio, 502, S. C., 17 New York Common Law Reports, 652. In a note to this case in the latter, a list of cases is given in which it is cited with approval.

In *Cook v. Ins. Co.* (Michigan) 47 North. W. Law Reporter, 568 (1890), the proofs of death had been put in without objection, and no question was made that the proofs were sufficient and seasonably made; but the presiding Judge, against the objection of the defendant, allowed the plaintiff's counsel to read them in detail to the jury, he saying that he did it for the sole purpose of showing that the proofs had been made; the defendant excepted, and the full court reversed the judgment, holding that all the proofs could be used for, by the plaintiff, was to show that they had been made.

The case of *Moore v. Ins. Co.*, 29 Maine, 97, is cited in support of the opposite doctrine. It did hold that the plaintiff's affidavit and examination before the defendant's agent were competent evidence in relation to the amount of the loss. This was based upon their being introduced without objection: *it does not appear that it was necessary for the plaintiff to make such proofs:* in fact, it seems that they could be *required* by the defendant, but were not necessary unless *required;* the plaintiff was not obliged to prove that he had made them in order to maintain his action; he offered them as general evidence and the defendants did not object. The case in this vital point is materially different from the case at bar.

No authority is cited by the court; and if it can be held to be an authority that proofs of loss which must be made and proved are evidence for the plaintiff for any other purpose than to prove that they *were* made, the case is open to the criticism of the Wisconsin and Missouri courts, that "it rests upon no authority and very poor reasons." *Hiles v. Ins. Co., ubi supra*; *Newmark v. Ins. Co.*, 30 Mo., 160.

Hincken v. Ins. Co., 50 N. Y., 657, is also cited to the same point; but the only question was whether oral evidence of the delivery of the proofs was sufficient, and it was held that, under the circumstances of that case, it was; *the proofs themselves were not in evidence.*

Life Ins. Co. v. Francisco, 17 Wallace, 672, has also been cited; but it does not touch the point; the question was as to the *sufficiency* of the proofs only; the defence objected that the requirement of the policy that the claimant should make *to the company* "due proof of the first claim of the assured" had not been complied with; it appeared that proofs were given to the defendants, on blanks furnished by the company, which had been filled in the presence of its agent; they were received without objection by him, and so far as the case disclosed no objection had been made by the company that the proofs were insufficient either in form or substance. It is familiar law now, that under such circumstances the company is estopped from objecting to the sufficiency of the proofs for any cause. Even if the proofs did not contain "due proof of the just claim of the assured," the company had waived its right to avail itself of the defect, for it had received them without objection; and the court so held. We repeat, that the question was in relation to the *sufficiency of the proofs*; that the question was not whether they were evidence *for the jury*, of the justness of the claim, is evident from the fact that *they had not been put in evidence when the ruling was made*.

It is true that later the defence put them in (and the description of the several statements which they contained is given) and then claimed that they were insufficient: they also claimed that the proofs showed that the insured made false answers to the questions in the application.

In this court counsel for the company in their argument said that "the proofs were correct in form but bad in substance," and argued that "the company was not bound to return them, or ask an explanation, or suggest a mode of explaining away fatal admissions." While the court will not allow the plaintiff to show that he made an error in the proofs, it equally holds the company to be estopped from objecting to the sufficiency of the proofs, if it receives them without objection. It will not permit the plaintiff to allege an error, nor the defendant to deny the sufficiency of the proofs, for the first time at the trial.

Nor is the mere designation of Crotty, in the policy, as a creditor, nor the statement of O'Brien in the application that Crotty was his creditor, legal proof of the allegation in the complaint.

In applications for policies of life insurance it is the practice to have the applicant state the relation between himself and the beneficiary, whereby the beneficiary can legally become such; no proof of this relation is required or offered; the existence of a proper relation is a condition precedent to a valid contract; the company take the statement, leaving the parties to prove it judicially, when the proper time comes, if it is denied.

This does not come under the defence of false representations: the objection is not because there has been a misrepresentation of the relation; that would be matter of defence. The answer is not that he misrepresented the relation, but it denies that the relation ever existed.

The relation must be proved; it is not a matter of mere technicality, but upon its existence depends the determination whether the policy is a beneficial contract of life insurance or a mere wager and dangerous to the public. It, therefore, should be clearly proved, especially when the relation claimed is that of creditor; the favorite form for fraudulent and wagering insurance is a creditor's policy.

The question as to whether one man is a creditor of another, is a question of fact, resting largely within his own knowledge: especially is this so when the alleged debtor is dead, as is always the case in this class of contracts. It is generally difficult and often impossible to prove a negative, and, therefore, the law, as a rule, throws the burden upon the party having the affirmative. It would be practically impossible for a Life Insurance Company to have any means of knowing whether the plaintiff was a creditor, when he took out his policy, and especially that he was one at the time of the loss, as the California statute requires, unless the claimant is obliged to make good his claim by showing that he was in fact a creditor.

All considerations point to the conclusion that the statements in the application and policy are mere statements of claim of title, which the plaintiff must make good at the trial by proper evidence, and are not agreements by which the parties are bound.

The cases practically hold that this allegation of insurable interest must be proved by evidence *aliunde* the policy and application.

In *Ins. Co. v. Volger*, the policy was made a part of the complaint, but the demurrer was sustained because the complaint did not aver an insurable interest: if the policy was evidence of an insurable interest, there was no need of such an averment elsewhere in the complaint, when the policy was made a part of it.

In fact, in the large number of cases which we have cited, while this particular question did not arise, as matter of fact evidence *aliunde* the papers was adduced to prove the allegation of an insurable interest when that allegation was denied.

For instance, in *Ins. Co. v. Holabird*, 2 Ins. Law J., 589, the policy was issued to the plaintiff upon the life of O. F. Holabird, her husband; the defendant denied that she was the wife of Holabird, and the court held that she must prove that she was his lawful wife. In calling the attention of the jury to the evidence, the presiding Judge, in his charge, did not allude to the statement in the policy as being any evidence upon the issue.

The precise question did arise in *Ruse v. The Mutual Benefit Life Ins. Co.*, 23 N. Y., 516. The court below held that the statement in the application, accepted by the Company, that he had an insurable interest in the life insured, was sufficient proof of interest.

26 Barb., 556.

The Court of Appeals reversed the judgment, saying:

"It is said that the defendants, by issuing the policy upon the representation of the plaintiff that he had an interest, have admitted his interest, and that the production of the policy is at least *prima facie* evidence of such interest. This position cannot be sustained. All the older authorities show that even in actions upon marine policies not containing the clause 'interest or no interest,' it was necessary to aver, and of course to prove the interest of the plaintiff. It is an indispensable part of the plaintiff's case to be made out affimatively at the trial."

In this case, there is another consideration. By the terms of the application every person claiming any interest in the policy expressly warrants that the answer to the question relating to Crotty's being his creditor is true.

Under the old rule, it is familiar law, that the plaintiff must prove that this warranty was true. It would not be claimed that in such case the warranty itself is any evidence of its truth.

In *Life Ins. Co. v. Ewing*, 92 U. S. this rule was so far modified, that so far as they "relate to matters occurring in childhood, or which concern the health or habits of the ancestors of the assured, and to other matters of opinion rather than fact," insurer shall take the burden of proving the breach of the warranty. The reason given is—

"While it may be easy enough to prove the affirmative of one of these questions, it is next to impossible to prove the negative."

It will be observed that the application in the present case has two classes of questions to which the warranty applies, those given in "Form A" and those given in "Form B."

Those in "Form B" are the class of cases which are mentioned in the opinion in the case last cited. But those in "Form A" are of an entirely different character.

They relate to the name, residence, occupation, age and place of birth of the applicant, his being insured in this company, and his present insurance in other companies: the relation of the beneficiary to him as affecting the insurable interest; and whether he is engaged in the manufacture or sale of intoxicating liquors or ever has been.

To none of these, except perhaps the last, does the reason for the modification of the old rule apply. But the reason for the *modification* of the rule in the class of cases to which it applies, equally requires that the rule itself be sustained in relation to the questions in "Form A" of this application and especially in relation to the question concerning the interest of the plaintiff in the life of O'Brien.

As already remarked, if Crotty was a creditor of O'Brien, it is easy for him to prove it: and the observation of the court that "it is next to impossible to prove the negative," applies perfectly to an attempt of the company to prove that Crotty was *not* the creditor of O'Brien.

We submit with confidence that a modification of an old, well established rule of law should extend no further than the *reason* for the rule absolutely requires. The provision in a contract that a party must prove the truth of an immense number of propositions, involving in each case the proving of a negative, is so unreasonable that it may well be held, that the parties to the contract could not have so intended; indeed, we have reason to believe that these questions in "Form B" were not made warranties in order to compel the plaintiff to prove the truth of all of them, but to make representations "material" in law, which courts had held not to be "material," but which practical insurance men held to be *actually* material in determining the question of accepting the risk.

But it is not an unreasonable provision of a contract, that the plaintiff must prove the truth of his warranty that he has an insurable interest in the life of a man whose life is insured by him for his own benefit.

We hold, therefore, that there was no error:

1. In the refusal of the Judge to compel the defendant to elect upon which defence it would rely;

2. In his ordering a verdict for the defendant when the plaintiff rested the first time;

3. In his striking out the testimony offered after the case had been opened conditionally;

4. But if he did err in so doing and his ruling is examinable here, still with the new testimony in the case, his subsequent rulings were correct.

And, therefore, that the judgment should be affirmed.

J. H. DRUMMOND & J. H. DRUMMOND, Jr.,
for Defendant.